(20,359.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 96.

JOHN NEWTON WILLIAMSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

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1 UNITED STATES OF AMERICA, *District of Oregon, ss:*

To United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Oregon, wherein John Newton Williamson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this Apr. 12th, 1906.

WM. B. GILBERT,
Circuit Judge.

2 UNITED STATES OF AMERICA, *District of Oregon, ss:*

Due and legal service of the attached and foregoing citation is hereby accepted and admitted at Portland, in said District, this 12th day of April, 1906.

W. C. BRISTOL,
United States District Attorney for the United States.

[Endorsed:] No. —. In the United States Circuit Court for the District of Oregon. The United States of America *vs.* John Newton Williamson. Citation on writ of error. Filed April 12, 1906. J. A. Sladen, Clerk United States Circuit Court, District of Oregon, by G. H. Marsh, Deputy Clerk.

3 In the Supreme Court of the United States.

No. —.

JOHN NEWTON WILLIAMSON, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before the Honorable William H. Hunt, one of you, between The United

States of America, Plaintiff and Defendant in Error, and John Newton Williamson, Van Gesner, and Marion R. Biggs, Defendants, and John Newton Williamson, Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear, and We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date hereof, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this April 12, 1906.

[Seal United States Circuit Court, Oregon.]

J. A. SLADEN,
Clerk of the Circuit Court of the United States for the District of Oregon,
By G. H. MARSH,
Deputy Clerk.

[Endorsed:] In the Supreme Court of the United States. John Newton Williamson, plaintiff in error, *vs.* The United States of America, defendant in error. Writ of error. Filed April 12, 1906. J. A. Sladen, Clerk United States Circuit Court, District of Oregon, by G. H. Marsh, Deputy Clerk.

Service of the within Writ of Error made this day upon the Circuit Court of the United States for the District of Oregon, by filing with me as Clerk of said Court a duly certified copy of said Writ of Error.

April 12, 1906.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon,
By G. H. MARSH,
Deputy Clerk.

4 In the Circuit Court of the United States for the District of Oregon, October Term, 1904.

Be it remembered, That on the 11th day of February, 1905, there was duly filed in the Circuit Court of the United States for the District of Oregon, an Indictment in words and figures as follows, to wit:

5 In the Circuit Court of the United States of America for the District of Oregon, of the October Term, in the Year of Our Lord Nineteen Hundred and Four.

DISTRICT OF OREGON, *ss:*

The Grand Jurors of the United States of America, inquiring for the District of Oregon, upon their oath present, that John Newton Williamson, Van Gesner and Marion R. Biggs, late of the City of Prineville, in the district aforesaid, on the thirtieth day of June, in the year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did conspire, combine, confederate and agree together, and with divers other persons to the said grand jurors unknown, to commit an offense against the said United States, that is to say, to unlawfully, wilfully and corruptly suborn, instigate and procure a large number of persons, to wit, one hundred persons, to commit the offense of perjury, in the said district by taking their oaths there respectively before a competent officer and person in cases in which a law of the said United States authorized an oath to be administered, that they would declare and depose truly that certain declarations and depositions by them to be subscribed were true, and by thereupon, contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be true; that is to say, to suborn, instigate and procure the said persons respectively to come in person before him the said Marion R. Biggs, who was then and there a United States Commissioner for the said District of Oregon, and, after being duly sworn by and before him the said Marion R. Biggs, as such United States Commissioner, to state and subscribe under their oaths that certain public lands of the said United States, lying in Crook County, in said District of Oregon, open to entry and purchase under the acts of Congress approved June 3, 1878, and August 4, 1892, and
6 known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons respectively, and that they had not directly or indirectly made any agreement or contract in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner, and Marion R. Biggs would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and would have made agreements and contracts with them the said John Newton Williamson, Van Gesner and Marion R. Biggs by which the titles which they might acquire from the said United States in

such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, as co-partners in the firm of Williamson and Gesner, then and before then engaged in the business of sheep raising in said county; the matters so to be stated, subscribed and sworn by the said persons being material matters under the circumstances, and matters which the said persons so to be suborned, instigated and procured, and the said John Newton Williamson, Van Gesner and Marion R. Biggs would not believe to be true; and the said Marion R. Biggs, United States Commissioner as aforesaid, when administering such oaths to those persons, being an officer and person authorized by law of the said United States to administer the same oaths, and the said oaths being oaths administered in cases where a law of the said United States would then authorize an oath to be administered.

7 And the Grand Jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit: on the thirtieth day of June, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain paper, called a sworn statement, for the signature of one Campbell A. Duncan, who was one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, a paper of the tenor following:

Timber and Stone Lands—Sworn Statement.

LAND OFFICE AT THE DALLES,
OREGON, *June 30th*, 1902.

I, Campbell A. Duncan, of Prineville County of Crook, State of Oregon, desiring to avail myself of the provisions of the Act of Congress of June 3, 1878, entitled "An act for the sale of timber in the States of California, Oregon, Nevada, and Washington Territory," as extended to all the public land states by act of August 4, 1892, for the purchase of the S. 2 of N.E. 4 and S. 2 of N.W. 4 of Section 14, township 15 S., of range 18 E. W. M., in the district of lands subject at The Dalles, Oregon, do solemnly swear that I am a native citizen of the United States, of the age of 34, and by occupation Farmer that I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its Timber; that it is uninhabited; that it contains no mining or other improvements * * *, nor, as I verily believe, any valuable deposits of gold, silver, cinnabar, copper or coal; that the land contains no salt spring or deposit of salt in any form sufficient to render it valuable therefor; that I have made no other application under said act; that I do not apply to pur-

8 chase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whom-

soever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself, and that my postoffice address is Prineville, Ore.

——— ———,
Applicant.

STATE OF OREGON, *County of Crook, ss:*

— ——— do hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known, (or has been satisfactorily identified before me by ——— ———) and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this — day of —— 1902.

——— ———.

And the grand jurors aforesaid upon their oath aforesaid, do further present, that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the thirtieth day of June, in the same year of our lord nineteen hundred and two, at Prineville, aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Susie M. Duncan, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Susie M. Duncan as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbe-
9 fore set forth according to its tenor, but referring to certain public lands known and described as the southwest quarter of section fourteen, in township fifteen south of range eighteen east (reference being had to the Willamette meridian and base-line.)

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the said thirtieth day of June, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Frank Ray, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Frank Ray as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the southeast quarter of section thirty, in township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the said thirtieth day of June, in the same year of our Lord nineteen

hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Ethie M. Ray, who was another one of the persons to be suborned, instigated and procured as aforesaid, that is to say the sworn statement required of the said Ethie M. Ray as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth
10 according to its tenor, but referring to certain public lands known and described as the southwest quarter of section thirty, in township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the said thirtieth day of June, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said District, unlawfully did prepare a certain other sworn statement, for the signature of one Ben F. Jones, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Ben F. Jones as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the northwest quarter of section six, in township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the said thirtieth day of June, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Nancy D. Jones, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say the sworn statement required of the said Nancy D. Jones as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the southwest quarter of section six, in
11 township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the said thirtieth day of June, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Green Beard, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Green Beard as an appli-

cant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the northeast quarter of section thirty, in township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the said thirtieth day of June, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Mary J. Beard, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Mary J. Beard as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the northwest quarter of section thirty, in township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the sixteenth day of July, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Emmett B. Holman, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Emmett B. Holman as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the west half of the southwest quarter, the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section twenty-one, in township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the said sixteenth day of July, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Henry Hudson, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Henry Hudson as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands

known and described as the northeast quarter of section
13 twenty-eight, in township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the said sixteenth day of July, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Christian Feuerhelm, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Christian Feuerhelm as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the southeast quarter of section twenty-eight, in township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the eighteenth day of July, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Wilford J. Crain, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say the sworn statement required of the said Wilford J. Crain as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement herein-
14 before set forth according to its tenor, but referring to certain public lands known and described as the southeast quarter of section twenty-four, in township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the nineteenth day of July, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Jennie Crain, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Jennie Crain as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the southwest quarter of section twenty-four, in township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the twenty-second day of July, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Henry E. Beard, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say the sworn statement required of the said Henry E. Beard as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public
15 lands known and described as the southeast quarter of section twenty-two, in township fifteen south and range nineteen east (reference being had to the said Willamette Meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the twenty-sixth day of July, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Jefferson D. Evans, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Jefferson D. Evans as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public
16 lands known and described as the west half of the northeast quarter and the west half of the southeast quarter of section two, in township sixteen south and range eighteen east (reference being had to the said Willamette Meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the said twenty-sixth day of July, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Mahala J. Evans, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Mahala J. Evans as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the east half of the northeast quarter and the east half of the southeast quarter of section twelve, in township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object

of the same, the said Marion R. Biggs afterwards, to wit, on the fifth day of August, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement, for the signature of one Ernest D. Starr, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Ernest D. Starr as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set
17 forth according to its tenor, but referring to certain public lands known and described as the northeast quarter of section twenty-four, in township fifteen south and range eighteen east (reference being had to the Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the said nineteenth day of July, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain other sworn statement for the signature of one John S. Watkins, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said John S. Watkins as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the northeast quarter of section twenty-four, in township fifteen south and range nineteen east (reference being had to the said Willamette meridian and base-line).

And that further in pursuance of the said unlawful conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the said nineteenth day of July, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in said district, unlawfully did prepare a certain other sworn statement, for the signature of one Lettie Watkinds, who was another one of the persons who were to be suborned, instigated and procured as aforesaid, that is to say, the sworn statement required of the said Lettie Watkinds as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the northwest quarter of section twenty-four,
18 in township fifteen south and range nineteen east (reference being had to the said Willamette Meridian and base-line).

Against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FRANCIS J. HENEY,
United States Attorney.

Names of Witnesses:
W. T. Fogle.
Wells A. Bell.
Miss Maggie Glaze.
Thos. B. Newhausen.
Christian Fuerhelm.
Richard W. Breeze.
Floyd A. Rowell.
Green Beard.
Henry E. Beard.
Frank Ray.
Elmer W. Kayler.
T. M. Baldwin.
Campbell A. Duncan.
John S. Watkins.
Henry Hudson.

Endorsed: A True Bill. W. H. H. Wade, Foreman. Filed February 11, 1905, J. A. Sladen, Clerk U. S. Circuit Court for District of Oregon.

19 And afterwards, to wit, on Saturday, the 11th day of February, 1905, the same being the 113th Judicial day of the Regular April Term of said Court; Present: the Honorable Charles B. Bellinger United States District Judge presiding, the following proceedings were had in said cause, to-wit:

20 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

FEBRUARY 11, 1905.

Now, at this day, comes into Court the Grand Jury impanelled herein, and, through its foreman, presents to the Court an indictment charging the above named defendants, John Newton Williamson, Van Gesner and Marion R. Biggs, with conspiracy to defraud the United States in violation of Section 5440 of the Revised Statutes of the United States, endorsed "a true bill," which Indictment is received by the Court and ordered to be filed.

And, thereupon, on motion of Mr. Francis J. Heney, United States Attorney, it is ordered, that the bail of each of said above named defendants be, and it is hereby, fixed at the sum of $4000.00.

And it is further ordered, that the Clerk of this Court be, and he is hereby, authorized to take the bail of said defendants, and he is further authorized and directed to approve the bonds of said defendants when presented to the Court.

21 And afterwards, to wit, on Friday, the 14th day of April 1905 the same being the 5th Judicial day of the Regular April Term of said Court; Present: the Honorable Charles B. Bellinger United States District Judge presiding, the following proceedings were had in said cause, to-wit:

22 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON ET AL.

Indictment: Section 5440, R. S., U. S.

APRIL 14, 1905.

Now, at this day, comes the plaintiff herein by Mr. Francis J. Heney, United States Attorney, and the defendant, John Newton Williamson, in his own proper person and by Mr. H. S. Wilson, of counsel, and, thereupon, on motion of said defendant, it is ordered, that said defendant, John Newton Williamson, be and he is hereby allowed until tomorrow, Saturday, April 15, 1905, in which to enter his plea herein.

23 And afterwards, to wit, on Saturday, the 15th day of April 1905 the same being the 6th Judicial day of the Regular April Term of said Court; Present: the Honorable Charles B. Bellinger United States District Judge presiding, the following proceedings were had in said cause, to-wit:

24 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

APRIL 15, 1905.

Now, at this day, comes the plaintiff herein by Mr. Francis J. Heney, United States Attorney, and the defendants, John Newton

Williamson, Van Gesner and Marion R. Biggs, each in his own proper person and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and, thereupon, said defendants and each of them, were duly arraigned upon the indictment herein, and said defendants, and each of them, waives the reading of said indictment. Thereupon, said defendant, John Newton Williamson, files in open court his demurrer to said indictment, and said defendants, Van Gesner and Marion R. Biggs, and each of them, file, in open Court, their respective pleas in abatement to said Indictment, which pleas are objected to by said plaintiff upon the ground, first, that it comes too late: second, that it contains matiers which contradict the record or which are, if true, only provable by the testimony of the Grand Jury or of the United States Attorney, who must be permitted to disclose that which the terms of their oaths, or the general rule of law, require them to keep secret, in order to contradict the same, and the effect of which is to impeach their verdict; and that such matters cannot be set up in a plea in abatement.

And thereupon, upon stipulation of the parties made in open Court, it is ordered, that the hearing of this cause, upon said pleas in abatement, and upon said demurrer, be, and it is hereby, set for Monday, April 17, 1905, at 10 o'clock A. M.

25 And afterwards, to wit, on the 15th day of April, 1905, there was duly filed in said Court, a Demurrer of Defendant J. N. Williamson to the Indictment in words and figures as follows, to wit:

26 In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, Plaintiff,
v.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS, Defendants.

Comes now the above named defendant, John Newton Williamson in person and by H. S. Wilson and A. S. Bennett, his attorneys, and demurs to the indictment in the above entitled cause, and says:

That the said indictment, and the matters and facts therein contained in manner and form as the same are stated, are not sufficient in law, and are not sufficient to constitute a crime, and that said indictment is not direct and certain as to the crime charged, or the particular circumstances of the crime. And that it does not set forth the name or identity of the persons defendants are charged with having conspired to suborn, and does not describe or identify the perjury which is alleged to have been suborned, instigated and procured, or the land as to which such perjury was to be committed. And that the said John Newton Williamson is not bound by the law of the land to answer said indictment, and this he is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf the said John Newton Williamson prays judgment as to the same, and prays that the same be quashed and adjudged insufficient, and that he may be dismissed and discharged from answering the same.

JOHN NEWTON WILLIAMSON,
Defendant.

27

H. S. WILSON,
A. S. BENNETT,
Attorneys for Defendant.

UNITED STATES OF AMERICA, *District of Oregon, ss:*

We, H. S. Wilson and A. S. Bennett, hereby certify that we are each of us attorneys of the above entitled court, and that in our judgment and opinion, and in the judgment and opinion of each of us, said demurrer is well founded in law.

H. S. WILSON.
A. S. BENNETT.

Filed April 15, 1905.
J. A. SLADEN,
Clerk U. S. Circuit Court for District of Oregon.

28 And afterwards, to wit, on Tuesday, the 25th day of April, 1905, the same being the 14th Judicial day of the Regular April Term of said Court; Present: the Honorable Charles B. Bellinger, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

29 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

APRIL 25, 1905.

Now, at this day, comes the above mentioned plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendant John Newton Williamson, by Mr. Alfred S. Bennett and Mr. H. S. Wilson, of counsel, and, thereupon, upon stipulation and agreement of the said parties hereto made in open Court, it is ordered, that the demurrer of the said defendant, John Newton Williamson, heretofore filed in this cause be submitted to the Court upon written briefs to be hereafter filed herein, and that said defendant have ten days in which to prepare and file and mail to the United States Attorney his type-written or printed briefs thereon, and that said United States Attorney have five days in which to prepare and mail to said

attorneys for the said defendant his brief in answer thereto, and that the defendant have two days from the receipt of the last mentioned brief in which to reply thereto.

30 And afterwards, to wit, on Monday, the 26th day of June, 1905, the same being the 56th judicial day of the Regular April term of said Court; Present: the Honorable John J. De Haven, United States District Judge for the Northern District of California presiding, the following proceedings were had in said cause, to-wit:

31 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

JUNE 26, 1905.

This cause was heard upon the demurrer of the defendant John Newton Williamson, to the indictment herein, and was argued by counsel. On Consideration Whereof, It is now here ordered and adjudged that said demurrer be, and the same is hereby, overruled.

And thereupon, it is ordered, that the trial of this cause be, and the same is hereby, set for Monday, July 3, 1905, at 10 o'clock, A. M.

32 And afterwards, to wit, on Friday, the 7th day of July, 1905, the same being the 65th judicial day of the Regular April term of said Court; Present: the Honorable John J. De Haven, United States District Judge for the Northern District of California presiding, the following proceedings were had in said cause, to-wit:

33 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

JULY 7, 1905.

Now, at this day, comes the plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants, John N. Williamson, Van Gesner and Marion R. Biggs, appearing each in his own proper

person and by Mr. Alfred S. Bennett and Mr. H. S. Wilson, of counsel, and thereupon each of said defendants for plea to the indictment herein for himself says he is not guilty as charged in said indictment.

34 And afterwards, to wit, on Monday, the 28th day of August 1905 the same being the 169th Judicial day of the Regular April Term of said Court; Present: the Honorable William B. Gilbert United States Circuit Judge presiding, the following proceedings were had in said cause, to-wit:

35 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

. AUGUST 28, 1905.

Now, at this day, on motion of Mr. Francis J. Heney, United States Attorney, it is ordered, that the trial of this cause heretofore set for this day, be, and the same is hereby, continued to Tuesday, September 5, 1905, and it is further ordered, that the trial of this cause shall take precedence before the cause heretofore set for trial on said September 5, 1905.

36 And afterwards, to wit, on the 5th day of September 1905 there was duly filed in said Court, a motion for a continuance, and affidavit in words and figures as follows, to wit:

37 In the United States Circuit Court for the District of Oregon.

UNITED STATES
vs.
J. N. WILLIAMSON ET AL.

——, *ss:*

Now, on this day, come the defendants in the above entitled cause and move the Court to discharge the jury named now attending and to discontinue the trial of this cause upon the grounds stated in the affidavit filed herewith.

H. S. WILSON,
A. S. BENNETT,
Attorneys for the Defendants.

38 UNITED STATES DISTRICT OF OREGON, *ss:*

I, A. S. Bennett, being first duly sworn say that I am one of the attorneys in this case and that by order of Judge De Huver, to which reference is hereby made, the jury named in this cause was drawn exclusively from only nine of the thirty-three counties in the state and that more than half of them are drawn from the County of Multnomah alone. That all that portion of the state, lying east of the Cascade Mountains, in which the defendants reside and in which the crime is alleged to have been committed was excluded from said drawing. That no juror drawn on this panel lives within one hundred miles of the place where the crime is alleged to have been committed. That I am informed and believe that the box from which said panel was drawn, has lately been filled. That no public record was made, as I am informed and believe, of such drawing, or of the names in said box, and there is no way of which I am informed, of ascertaining whether said box contained the required number of qualified jurors at the time of the drawing.

That on yesterday the following article was published in the "Morning Oregonian," a newspaper of very general circulation in the city and state.

39 Witnesses in State of Fear.

Barn-burning in Crook is Thought to be Act of Revenge.

W. J. Crain the Victim.

Men Called to Testify in Land-fraud Cases Regard Incendiarism in the Light of a Prophecy Which is Fulfilled.

The witnesses for the Government in the third trial of the Williamson-Gesner-Biggs case are panic-stricken, and, like a herd of cattle from the ranges whence they come, have to be milled and sung into quiet by the voices of the Government officials to prevent a wild stampede toward their homes. The cause of all the excitement is the news received Friday by Wilford J. Crain that his barn, six miles from Prineville, had been burned, together with its store of this year's produce, while the house was saved only by the timely arrival of Charles Crain, a brother, who checked the advance of the flames. This news, coming in the light of prophecy fulfilled to many of those now in Portland to give their testimony before the grand jury, has created a panic and a great desire to hasten to protect their homes from the three men whose tracks were found leading from the ruins of the Crain storehouse into the town of Prineville.

Fear Added to Reluctance.

From the first, when the men were summoned before the first grand jury to tell what they knew about the operations of the firm

of Williamson and Gesner, through the first and the second trials and up to this time during the sessions of the present grand jury it has been a hard task to hold the witnesses for the Government to their tasks. The defendants were their friends, in some cases their benefactors, and it was only the fear of the law that forced them to tell their story in the first instance and in the last. But added to this cause of reticence and reluctance is another, that of fear.

During the first two trials there have been two witnesses, who have been threatened with vengeance unless they changed their testimony, so it is said. One of these men was Wilford J. Crain, the other was George Gaylord, both of whom testified to having had conversations with Gesner and Williamson in their offices at Prineville, at which time Williamson read them the statement of Secretary Hitchcock declaring war on Western timber frauds. The witnesses testified that Williamson had told them to relinquish their claims and that in the future, when things became quiet once more, it would be possible for them to take the lands again.

At the time this testimony was given, so the story runs, several of the Government witnesses were told, Crain and Gaylord being among the number, that unless their testimony was given "right" a way could be found to "get even" with them for the harm done. Then the Government had more trouble in keeping its men in line, and it was so evident that the witnesses would not tell what they knew that Judge De Haven instructed the District Attorney to lead them in their testimony.

Sheriff Smith's Advice.

During the time of the first and the second trials and during the sessions of the present grand jury, C. Sam Smith, the Sheriff of Crook County, was and is in Portland working upon the sympathies of the Crook County witnesses. He has reminded them of the favors shown them in the past, of their friendship, and, it is said, has also had other threats in his arguments.

Friday Campbell Duncan received a letter telling of the destruction of Crain's barn, and on the same day Crain himself received word from his wife telling of the fire. Like the greater number of the witnesses in attendance upon the grand jury, Crain had his crops gathered either in stacks or stowed away in barns and storehouses. One night last week, according to the letter, the barn belonging to Crain was discovered to be on fire and in a short time was a total loss. The flames, spreading over the stubble field surrounding, were sweeping toward the house, and had almost reached the building when Charles Crain reached the scene from a neighboring farm and, after a hard fight, succeeded in quenching them.

Tracks of Three Men.

After the fire had been extinguished and the barn had been destroyed an examination of the premises showed the tracks of three men which were followed through the dust to Prineville, more than six miles away.

The news of this fire and the knowledge of its incendiary origin, coupled with things that have gone before, has thrown the witnesses from Crook County into consternation so great that they have been kept in the city only by the greatest efforts on the part of the Government. They remain, waiting for the beginning of the third trial tomorrow morning, but deep in the mind of each is the fear that other disastrous news will be received before its end.

40 That said article will necessarily prejudice the defendants in the trial of this case and greatly excite the public mind and the minds of attending jurors against the defendants, and that I believe and allege that it was published for that purpose and that it was instigated by some one interested in this prosecution to prevent the defendants from having a fair trial.

A. S. BENNETT.

Subscribed and sworn to before me this 5th day of September, 1905.

J. A. SLADEN, *Clerk,*
By G. H. MARSH,
Deputy Clerk.

Filed September 5, 1905.

J. A. SLADEN,
Clerk U. S. Circuit Court for the District of Oregon.

41 And afterwards, to wit, on Tuesday, the 5th day of September 1905 the same being the 116th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt United States District Judge for the District of Montana presiding, the following proceedings were had in said cause, to-wit:

42 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 5, 1905.

Now, at this day, comes the plaintiff herein, by Mr. Francis J. Heney, United States Attorney, and the defendants herein, John Newton Williamson, Van Gesner and Marion R. Biggs, in their own proper person and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and this being the day set therefor, the trial of this cause is begun: and the following named persons having been accepted by

both parties, to-wit: John Bain, J. Marcus Freeman, Thos. G. Farrell, James B. Kirk, Frank Bell, H. Donnerberg, Theobald Kirsch, Worth Huston, Dom J. Zan, J. J. Hembree, and Chas. Agee, and the examination of the twelfth person being in progress, and the hour of adjournment having arrived, the further trial of this cause is continued until tomorrow, Wednesday, September 6, 1905, at 10 o'clock, A. M.

43 In the Circuit Court of the United States for the District of of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 5, 1905.

It is ordered, that the jury impanelled herein for the trial of this cause be kept in the custody of the Marshal for the District during the trial of this cause, and until said jury shall have agreed upon a verdict or shall be discharged by the Court; that the Marshal shall furnish said jurors, when not in Court, with meals and beds in some convenient place where they may have privacy; and that they be attended by two bailiffs appointed by the Marshal.

It is further ordered, that neither the Marshal nor said bailiffs shall talk to any juror in relation to any matter connected with the trial of this cause, except when directed by the Court to ask if they have agreed upon a verdict, nor talk in the hearing of said jury in relation to any such matters, and they shall not permit any persons to speak to any member of the jury, or within the hearing of said jury, in relation to any matter connected with said trial.

44 And afterwards, to wit, on Tuesday, the 6th day of September 1905 the same being the 117th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

45 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 6, 1905.

Now, at this day, comes the plaintiff herein by Mr. Francis J. Heney, United States Attorney, and the defendants herein, John Newton Williamson, and Van Gesner in their own proper persons, and by Mr. A. S. Bennett and Mr. H. S. Wilson of counsel, and it appearing to the Court that the defendant, Marion R. Biggs, is unable to be present in Court by reason of sickness, the further trial of this cause is continued until tomorrow, Thursday, September 7, 1905, at 10 o'clock, A. M.

46 And afterwards, to wit, on Thursday, the 7th day of September 1905 the same being the 118th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

47 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 7, 1905.

Now, at this day, comes the plaintiff herein by Mr. Francis J. Heney, United States Attorney, and the defendants herein, John Newton Williamson, Van Gesner and Marion R. Biggs, each in his own proper person, and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and, thereupon, this being the day set for the trial of this cause, now come the following named jurors to try the issues joined, to wit: John Bain, J. Marcus Freeman, Thos. G. Farrell, James B. Kirk, Frank Bell, H. Donnerberg, Theobald Kirsch, Worth Huston, Dom J. Zan, J. J. Hembree, Chas. Agee, and John E. Bailey, twelve good and lawful men of the District, who, being accepted by both

parties hereto, and duly impanelled and sworn, proceed to hear the evidence adduced, and the hour of adjournment having arrived, the further trial of this cause is continued until tomorrow, Friday, September 8, 1905.

48 And afterwards, to wit, on Friday, the 8th day of September, 1905, the same being the 119th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

49 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 8, 1905.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants herein, each in his own proper person, and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until tomorrow, Saturday, September 9, 1905, at 9.30 A. M.

50 And afterwards, to wit, on Saturday, the 9th day of September, 1905, the same being the 120th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

51 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 9, 1905.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants herein each in

his own proper person and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until 9.30 A. M. of Monday, September 11, 1905.

52 And afterwards, to wit, on Monday, the 11th day of September, 1905, the same being the 121st Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

53 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 11, 1905.

Now, at this day, comes the plaintiff herein by Mr. Francis J. Henry, United States Attorney, and the defendants, each in his own proper person, and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until tomorrow, Tuesday, September 12, 1905, at 9.30 A. M.

54 And afterwards, to wit, on Tuesday, the 12th day of September, 1905, the same being the 122d Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

55 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 12, 1905.

Now, at this day, comes the plaintiff herein by Mr. Francis J. Heney, United States Attorney, and the above named defendants,

each in his own proper person and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and, thereupon, the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until 9.30 A. M., of tomorrow, Wednesday, September 13, 1905.

56 And afterwards, to wit, on Wednesday, the 13th day of September, 1905, the same being the 123d Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

57 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 13, 1905.

Now, at this day, comes the plaintiff herein by Mr. Francis J. Heney, United States Attorney, and the defendants, each in his own proper person and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and, thereupon, the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until 9.30 A. M. of Thursday, September 14, 1905.

58 And afterwards, to wit, on Thursday, the 14th day of September, 1905, the same being the 124th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

59 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, *and* MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 14, 1905.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants herein, each in his own proper person, and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and, thereupon, the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived the further trial of this cause is continued until 9.30 A. M. of tomorrow, Friday the 15th day of September, 1905.

60 And afterwards, to wit, Friday, the 15th day of September, 1905, the same being the 125th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

61 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 15, 1905.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants herein, each in his own proper person and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and thereupon, the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until 9.30 A. M. of Saturday, September 16, 1905.

62 And afterwards, to wit, on Saturday, the 16th day of September, 1905, the same being the 126th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

63 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 16, 1905.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants herein, each in his own proper person and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and thereupon, the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until 9.30 A. M. of Monday, September 18, 1905.

64 And afterwards, to wit, on Monday, the 18th day of September, 1905, the same being the 127th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

65 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 18, 1905.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants herein, each in his own proper person and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and, thereupon, the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the

further trial of this cause is continued until 9.30 A. M. of Tuesday, September 19, 1905.

66 And afterwards, to wit, on Tuesday, the 19th day of September, 1905, the same being the 128th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

67 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 19, 1905.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants herein, each in his own proper person, and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and, thereupon, the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until 9.30 A. M. of Wednesday, September 20, 1905.

68 And afterwards, to wit, on Wednesday, the 20th day of September, 1905, the same being the 129th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

69 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 20, 1905.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants herein, each

in his own proper person and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived the further trial of this cause is continued until 9.30 A. M. of Thursday, September 21, 1905.

70 And afterwards, to wit, on Thursday, the 21st day of September, 1905, the same being the 130th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

71 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 21, 1905.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants herein, each in his own proper person, and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until 9.30 A. M. of Friday, September 22, 1905.

72 And afterwards, to wit, on Friday, the 22d day of September 1905 the same being the 131st Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

73 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 22, 1905.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants herein, each

in his own proper person, and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until 9.30 A. M. of Saturday, September 23, 1905.

74 And afterwards, to wit, on Saturday, the 23d day of September 1905 the same being the 132d Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

75 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 23, 1905.

Now, at this day, come the parties hereto with and by their counsel as of yesterday, and the jury impanelled herein being present, and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until Monday, September 25, 1905.

76 And afterwards, to wit, on Monday, the 25th day of September, 1905, the same being the 133d Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

77 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 25, 1905.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants herein, each

in his own proper person, and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until 9.30 A. M. of Tuesday, September 26, 1905.

78 And afterwards, to wit, on Tuesday, the 26th day of September, 1905, the same being the 134th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

79 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 26, 1905.

Now, at this day, come the parties hereto by and with their counsel as of yesterday, and the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until 9.30 A. M. of tomorrow, Wednesday, September 27, 1905.

80 And afterwards, to wit, on Wednesday, the 27th day of September, 1905, the same being the 135th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

81 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 27, 1905.

Now, at this day, comes the plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants, John Newton William-

son, Van Gesner and Marion R. Biggs, each in his own proper person and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and the jury impanelled herein being present and answering to their names, the trial of this cause is resumed, and the said jury having heard the evidence adduced, the arguments of counsel and the charge of the Court, retire from the Court-room to consider of their business, And thereupon, the said jury return into Court their verdict, which verdict is received by the Court and ordered to be filed and entered in this cause, and which verdict is in words and figures as follows: "We, the jury in the above entitled cause, find the defendants, J. N. Williamson, Van Gesner and Marion R. Biggs, guilty as charged in the indictment, and recommend them to the leniency of the court on account of previous good character. John Bain, Foreman."

And, thereupon, on motion of the defendants herein, it is ordered, that said defendants be, and they are hereby, allowed ten days from this date in which to move for a new trial herein.

82 And afterwards, to wit, on the 27th day of September, 1905, there was duly filed in said Court, a verdict, in words and figures as follows, to wit:

83 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
J. N. WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

We, the jury in the above entitled cause, find the defendants J. N. Williamson, Van Gesner and Marion R. Biggs guilty as charged in the indictment, and recommend them to the leniency of the Court on account of previous good character.

JOHN BAIN,
Foreman.

Filed September 27, 1905.

J. A. SLADEN,
Clerk U. S. Circuit Court for the District of Oregon.

84 And afterwards, to wit, on Thursday, the 28th day of September, 1905, the same being the 136th Judicial day of the Regular April Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

85 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON ET AL.

Indictment: Section 5440, R. S., U. S.

SEPTEMBER 28, 1905.

Now, at this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants herein by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, and, thereupon, on motion of said defendants, it is ordered, that the defendants be, and they are hereby, allowed until Friday, October 6, 1905, in which to file motions for a new trial, and for arrest of Judgment.

86 And afterwards, to wit, on the 7th day of October, 1905, there was duly filed in said Court, a motion of defendant J. N. Williamson for a new trial, in words and figures as follows, to wit:

87 In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS, Defendant-.

Motion for New Trial.

Comes now the above named defendant, John Newton Williamson, for himself alone by his attorneys Bennett & Sinnott and Huntington & Wilson, and moves the court to set aside the verdict herein for a new trial in the above entitled cause for the following causes materially affecting the substantial rights of the said John Newton Williamson:

Error in law occurring at trial and excepted to by the said defendant making this motion.

BENNETT & SINNOTT,
HUNTINGTON & WILSON,
Attorneys for John Newton Williamson.

Filed October 7, 1905.

J. A. SLADEN,
Clerk U. S. Circuit Court for the District of Oregon.

88 And afterwards, to wit, on the 7th day of October, 1905, there was duly filed in said Court, a motion of defendant J. N. Williamson, in arrest of Judgment in words and figures as follows, to wit:

89 In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS, Defendants.

Motion for Arrest of Judgment.

Comes now the above named defendant John Newton Williamson, for himself alone by his attorneys Bennett & Sinnott and Huntington & Wilson, and moves the court that judgment in the above entitled cause be arrested as against him for the following reasons:

First. Error appearing on the face of the record.

Second. Error committed by the Court to which the said defendant excepted in overruling defendants' demurrer to the indictment herein.

Third. For the reason that the indictment herein does not state a crime, in that, among other things, it does not sufficiently, or at all, allege that this defendant or any of the said defendants at the time of the alleged conspiracy or at all knew that the matter to be sworn to would be false or that the defendants then knew that the persons to be suborned, or any of them, would know their statements to be false at the time they were made, or that the defendants knew or believed that the persons to be suborned, or any of them, would knowingly, or wilfully, or corruptly take a false oath with reference to the matters alleged in the indictment, or at all.

Fourth. For the reason that said indictment is so uncertain that it does not state a crime, and for each and all of the reasons assigned in defendant's said demurrer on file herein.

BENNETT & SINNOTT,
HUNTINGTON & WILSON,
Attorneys for John Newton Williamson.

Filed October 7, 1905.

J. A. SLADEN,
Clerk U. S. Circuit Court for the District of Oregon.

90 And afterwards, to wit, on Saturday, the 14th day of October, 1905, the same being the 12th Judicial day of the Regular October Term of said Court; Present: the Honorable William H. Hunt, United States District Judge for the District of Montana, presiding, the following proceedings were had in said cause, to-wit:

91 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

THE UNITED STATES OF AMERICA
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS.

Indictment: Section 5440, R. S., U. S.

OCTOBER 14, 1905.

Now, on this day, comes the above named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendants, John Newton Williamson, Van Gesner, and Marion R. Biggs, each in his own proper person and by Mr. A. S. Bennett and Mr. H. S. Wilson, of counsel, whereupon, by agreement of counsel, the motions of said several defendants for a new trial herein, and their several motions in arrest of judgment, are submitted to the Court without agreement; and the Court having considered said motions

— is now here ordered and adjudged, that said motions of said several defendants for a new trial herein, and said several motions in arrest of judgment, be, and they are, and each of them is, hereby denied.

And thereupon, on motion of said defendants, it is ordered, that they be and they are hereby allowed until Monday, October 16, 1905, in which to submit, and file with the Clerk of this Court, their proposed bill of exceptions in this cause:

And, thereupon, said plaintiff moves the Court for judgment upon the verdict of the jury heretofore filed and entered herein, and said defendants object to said judgment being entered herein by the Court herein, which objection is overruled by the Court, and there appearing to the Court to be no legal objections thereto,

It is considered and adjudged, that the defendant, John Newton Williamson pay a fine of five hundred dollars ($500.00) and
92 that he be imprisoned for a term of ten (10) months; that the defendant, Van Gesner do pay a fine of one thousand dollars ($1000.00) and that he be imprisoned for the term of five (5) months; and that the defendant Marion R. Biggs do pay a fine of five hundred dollars ($500.00) and that he be imprisoned for a term of ten (10) months.

Whereupon, the defendants herein move the Court for an order to stay the execution of this judgment in order to prepare and file a petition for appeal to the Supreme Court of the United States and their assignments of error and supersedeas bonds, and, thereupon, it is ordered, that the execution of the judgment herein be, and it is hereby, stayed until the further order of this Court.

93 And afterwards, to wit, on the 12th day of April, 1906, there was duly Filed in said Court, a Petition of Defendant

J. N. Williamson for Writ of Error and an Assignment of Errors, in words and figures as follows, to wit:

94 In the United States Circuit Court for the District of Oregon.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS, Defendants.

Petition for Writ of Error and Assignment of Errors of Defendant John Newton Williamson.

95 In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS, Defendants.

Petition for Writ of Error.

Your petitioner, the above named John Newton Williamson, one of the defendants in the above entitled cause, brings this his petition for a writ of error, to the Circuit Court of the United States for the District of Oregon, and thereupon your petitioner shows:

That on the 14th day of October, 1905, there was rendered and entered in the above entitled court and in the above entitled cause a judgment against your petitioner, wherein and whereby your petitioner, the said John Newton Williamson, was adjudged and sentenced to imprisonment for a term of ten (10) months and to pay a fine of Five Hundred ($500.00) Dollars; and your petitioner shows that he is advised by counsel that there was manifest error in the records and proceedings had in said cause, and in the rendition of said judgment and sentence to the great injury and damage of your petitioner, all of which error will be more fully made to appear by an examination of the said record, and more particularly by an examination of the bill of exceptions by your petitioner tendered and filed therein, and in the assignment of error thereon, hereinafter set out, and to that end, therefore, that the said judgment, sentence and proceedings may be reviewed by the Supreme Court of the United States, your petitioner now prays that a

96 writ of error may be issued, directed therefrom to the said Circuit Court of the United States for the District of Oregon, returnable according to law and the practice of the Court, and that there may be directed to be returned pursuant thereto, a true copy of the record, bill of exceptions, assignments of error and all proceedings had in said cause, that the same may be removed into the Supreme Court of the United States, to the end that the error, if any

hath happened, may be duly corrected, and full and speedy justice done your petitioner.

And your petitioner now makes the assignments of error attached hereto, upon which he will rely, and which will be made to appear by a return of the said record, in obedience to said writ.

Wherefore, your petitioner prays the issuance of a writ as hereinbefore prayed, and prays that the assignments of error annexed hereto may be considered as his assignment of error upon the writ, and that the judgment rendered in this cause may be reversed and held for naught, and said cause be remanded for further proceedings.

(Signed) JOHN NEWTON WILLIAMSON.
A. S. BENNETT,
H. S. WILSON,
Attorneys for John Newton Williamson.

97 In the United States Circuit Court for the District of Oregon.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS, Defendants.

Assignment of Errors of Defendant John Newton Williamson.

John Newton Williamson, one of the defendants in the above entitled cause, and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a writ of error to this Court, directed from the Supreme Court of the United States from the judgment and sentence made and entered in said cause against said John Newton Williamson, plaintiff in error and petitioner herein, now makes and files with the petition the following assignments of error herein, upon which he will rely for the reversal of said judgment and sentence upon the said writ; and says that in the record and proceedings in the above-entitled cause upon the hearing and determination thereof in the Circuit Court of the United States for the District of Oregon, there is manifest error in this, to-wit:

First. The said Circuit Court erred in overruling the demurrer of the said defendant John Newton Williamson to the indictment filed in said cause, demurring to said indictment upon the ground that it and the matters and facts therein contained, in the manner and form the same are stated, are not sufficient in law, and are not

98 sufficient to constitute a crime, and that said indictment is not direct and certain as to the crime charged, or the particular circumstances of the crime; and that it does not set forth the name or identity of the persons defendants, or charged with having conspired to suborn, and does not describe or identify the perjury which is alleged to have been suborned, instigated and procured, or the land as to which said perjury was committed.

Second. In overruling the objection of the said defendant to the question asked witness Ben Jones.

Q. Now at the time you signed and swore to it did you intend to convey this land to Dr. Gesner for the consideration named by him to you, as testified by you, as soon as you obtained the title
99 thereto?

And in permitting the witness to answer the same.

A. Yes, sir.

Third. In overruling the objection of the said defendant to the question asked of witness Ben Jones.

Q. Mr. Jones at the time you subscribed this final proof paper what was your intention with reference to this land as to what you would do with it when you obtained the title?

And in permitting the witness to answer the same.

A. Let Gasner have it.

Fourth. In overruling the objection of the said defendant to the question asked of witness Green Beard.

Q. At the time you appeared before him to file did you sign these two papers (showing witness sworn statement or application)?

And in permitting the witness to answer the same.

A. They look very much like the papers I signed.

Fifth. In admitting over the objection of the said defendant the sworn statement of Green Bearn of which the following is a copy:

"I Green Beard, of Prineville, County of Crook, State of Oregon, desiring to avail myself of the provisions of the Act of Congress of June 3rd, 1878, entitled an Act for the sale of timber in the States of California, Oregon, Nevada and Washington Territory, as extended to all the public land states by act of August 4, 1892, for the purchase of the S. 2 of N. E. 4 and S. 2 of N. W. 4 of Section 14, Township 15 S., of Range 18 E., W. M., in the district of lands subject at The Dalles, Oregon, do solemnly swear that I am a native citizen of the United States, of the age of 34, and by occupation farmer; that I have personally examined said land and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposits of gold, silver, cinnabar, copper or coal; that the land contains no salt springs or deposit of salt in any form, suffi-
100 cient to render it valuable therefor; that I have made no other application under said act; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit; and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure, in whole or in part to the benefit of any person except myself, and that my post office address is Prineville, Oregon.

"GREENE BEARD,
"Applicant.

"STATE OF OREGON, *County of Cook, ss:*

I, M. R. Biggs, do hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by —— ——) and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this 30th day of June, 1902.

"M. R. BIGGS,
"U. S. Commissioner."

Sixth. In admitting over the objection of the said defendant each and all of about forty other sworn statements of like tenor and effect as the one above set forth by Green Beard.

Seventh. In overruling the objection of the said defendant to the question asked of Green Beard.

Q. At the time you signed these papers what was your intention as to what you would do with the land when you obtained title to it?

And in permitting the witness to answer the same.

A. Why the land was to go—the land was to be turned over to Williamson and Gesner.

Eighth. In overruling the objection of the said defendant to the question asked of the witness John F. Watkins.

101 Q. What was your intention at the time you signed this, as to what you would do with the land, if anything, when you got it?

And in permitting the witness to answer the same.

A. I intended to convey it to that Company, Williamson & Gesner.

Ninth. In admitting over the objection of the said defendant the final proof papers of the witness John F. Watkins, as follows:

4–379.

Timber and Stone Lands.

Testimony of Claimant.

JOHN S. WATKINS being called as a witness in support of his application to purchase the N. E. ¼ of Sec. 24, Township 15 South, of Range 19, East W. M. testified as follows:

Question 1. What is your age, post-office address and where do you reside?

Answer. 43, Prineville, Ore. Crook Co., Ore.

Question 2. Are you a native born citizen of the United States, and if so in what state or territory were you born?

Ans. Yes, in Oregon.

Ques. 3. Are you the identical person who applied to purchase this land on the 21st day of July, 1902, and made the sworn statement assigned by law before the Register (or Receiver) or United States Commissioner, on that day?

Ans. Yes.

Ques. 4. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

Ans. Yes.

Ques. 5. When and in what manner was such inspection made?

Ans. In July, 1902, personal inspection.

Question 6. Is the land occupied; or are there any improvements on it not made for ditch or canal purposes, or which were not made by or do not belong to you?

Ans. No.

102 Ques. 7. Is the land fit for cultivation, or would it be fit for cultivation if the timber were removed?

Ans. No.

Ques. 8. What is the situation of this land, and what is the nature of the soil, and what causes render the land unfit for cultivation?

Ans. Hilly, rough and rockey, and the soil is not fit for cultivation.

Question 9. Are there any salines, or indications of deposit of gold, silver, cinnibar, copper, or coal on this land? If so, state what they are, and whether the springs or mineral deposits are valuable?

Ans. No.

Ques. 10. Is the land more valuable for mineral or any other purposes than for the timber and stone thereon, or is it chiefly valuable for timber or stone?

Ans. Timber.

Ques. 11. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. It is rough, hilly and rockey and is covered with ordinary good timber.

Ques. 12. What is the estimated market value of the timber standing upon this land?

Ans. About $800.00.

Ques. 13. Have you sold or transferred your claim to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract in any way or manner, with any person whomsoever, by which the title which you may acquire from the Government of the United States may inure in whole or in part, to the benefit of any person except yourself?

Ans. No.

Ques. 14. Do you make this entry in good faith for the appropriation of the land exclusively to your own use and not for the use or benefit of any other person?

Ans. Yes.

Ques. 15. Has any other person than yourself, or has any firm, corporation or association any interest in this entry you are

103 now making, or in the land, or in the timber thereon?

Ans. No.

JOHN S. WATKINS.

I hereby certify that the above named John S. Watkins personally appeared before me; that I verily believe affiant to be the person he represents himself to be; and that each question and answer in the

foregoing testimony was read to him in my presence before he signed his name thereto, and that the same was subscribed and sworn to before me at Prineville, Oregon, this 8th day of Dec. 1902.

M. R. BIGGS,
U. S. Commissioner for District of Oregon.

NOTE.—Every person swearing falsely to the above deposition is guilty of perjury and will be punished as provided by law for such offense. In addition thereto the money that may be paid for the lands is forfeited, and all conveyances of the land or of any right, title or claim thereto was absolutely null and void as against the United States.

I hereby certify that I have tested the accuracy of affiant's information and the *bona fides* of this entry by a close and sufficient oral cross-examination of the claimant and his witnesses, directed to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure in whole or in part to the benefit of any person or persons except himself, and am satisfied from such examination that the entry is made in good faith for entryman's own exclusive use and not for sale or speculation, nor in the interest nor for the benefit of any other person or persons, firm or corporation.

M. R. BIGGS,
U. S. Commissioner for District of Oregon.

104 Tenth. In admitting over the objection of the said defendant the cross-examination of said claimant J. F. Watkinds made in connection with said final proof, as follows:

Timber and Stone Lands.

Cross-examination of Claimant in Connection with Direct Examination.

On Form 4-370.

Before taking the testimony the Register and Receiver will read or cause to be read to the witness, Section 2392 of the Revised Statutes in regard to perjury—see bottom of page on Form 4-371—and see that witness understands same.

Question 1. Are you an actual *bona fide* citizen of this State? Yes.

Question 2. Are you married or single? Married.

Question 3. Where did you reside prior to becoming a resident of this State, and what was your occupation? Born and raised in Oregon. Am a farmer.

Question 4. How long have you been an actual resident of this State, and where have you lived during all of this time? 43 years. Linn and Crook Counties.

Question 5 What has been your occupation during the last year, and where and by whom have you been employed and at what compensation? Farming for myself.

Question 6. How did you first learn about this particular tract of land and that it would be a good investment to buy it? In July, wanting to take timber went up in the timber and located this land.

Question 7. Did you pay or agree to pay anything for this information? If so, to whom and the amount? No.

Question 8. Have you made a personal examination of each smallest subdivision of said land? If so, state when and under what circumstances and with whom. Yes, in July with my wife and
105 daughter, Wilford J. Crain and George M. Gaylord.

Question 9. How did you identify said lands? Describe it fully. By Government corners as N.E. ¼ Sec. 24 Tp. 15 S. R. 19 E. W. M.

Question 10. How many thousand feet, board measure, of lumber did you estimate that there is on this entire tract, and what is the stumpage value of same? One and a half million feet, at 50 cts. per M.

Question 11. Are you a practical lumberman or woodman? If not, how did you arrive at your estimate of the quantity and value of the lumber on the land? I have worked a great deal in the woods.

Question 12. What do you expect to do with this land and lumber on it when you get title to it? I expect to use it the best I can.

Question 13. Do you know of any capitalist or company which is offering to purchase timber land in the vicinity of this entry? If so, who are they and how did you know of them? No.

Question 14. Has any person offered to purchase this land after you acquire title? If so, who and for what amount? No.

Question 15. Where is the nearest and best market for the timber on this land at the present time? Prineville, Or.

Question 16. Did you pay out of your individual funds, all the expenses in connection with making this filing and do you expect to pay for the land with your own money? Yes.

Question 17. Where did you get the money with which to pay for this land and how long have you had same in your actual possession? Made it out of my hay crop of this year; had it about two months.

Question 18. Have you kept a bank account during the past six months, and if so, where? No.

106 In addition to the foregoing the officer before whom the proof is made will ask such questions as seem necessary to bring out all the facts in the case.

JOHN S. WATKINDS."

Eleventh. In admitting over the objection of the said defendant the sworn statement of Joel Calavan which was of like tenor and effect as of witness Green Beard.

Twelfth. In overruling the objection of the said defendant to the question asked of said witness Joel Calavan.

Q. What was your understanding at the time as to what the terms were upon which you were taking it up?

And in permitting the witness to answer the same.

A. Why I understood that I was to receive $500 for the same when the patent issued.

Thirteenth. In overruling the objection of the said defendant to the question asked of said witness Calavan.

Q. And was it your intention at the time you were making that filing to convey it for the $500 as soon as you did get patent or what was your intention in respect to it?

And in permitting the witness to answer the same.

A. My intention was to convey it to them when I got patent.

Fourteenth. In overruling the objection of the said defendant to the question asked of said witness Calavan.

Q. To whom?

And in permitting the witness to answer the same.

A. To Gesner.

Fifteenth. In admitting the final proof papers of the said witness Calavan, together with the cross-examination of the claimant which said final proof and cross-examination were substantially the same as in the case of witness Watkinds hereinbefore set forth.

Sixteenth. In overruling the objection of the said defendant to the question asked of witness Wilford J. Crain.

107 Q. What do you understand by a contract?

And in permitting the witness to answer the same.

A. Well, I don't know as I really understand a contract; but my idea is that it would be written.

Seventeenth. In overruling the objection of the said defendant to each of the following questions, and in permitting the answers thereto.

Q. That was your idea at the time, was it?

A. Yes, sir.

Q. Now at the time that you filed what was your intention as to what you would do with the land when you got title?

A. It was my intention to let Gesner have it.

Q. What was your understanding as to whether you had promised to do that or not?

—. ——.

Q. Well, what did you believe?

A. Well, I would have felt that way if I had went ahead and proved up on land and they had furnished me the money to do it with.

Q. What was your understanding of it?

A. Yes, sir.

Eighteenth. In overruling the objection of the said defendant to the question asked of witness Jeff Evans.

Q. What did you understand by a contract?

And in permitting the witness to answer the same.

A. Well, I supposed by making a contract that I would have to go into writing, that I would turn this land over to him or he would pay me, as long as I didn't sell it and take money on it, or sign a contract, that it was all right.

Nineteenth. In overruling the objection of the said defendant to the question asked of witness Jeff Evans.

Q. Now at the time you signed that paper, what was your intention as to what you would do with the land when you secured a patent to it?

108 And in permitting the answer to the same.

A. Well, of course, I calculated to sell it; I supposed that Mr. Gesner would take the land.

And also in overruling the same objection to each of the following questions and in permitting answers thereto by the same witness.

Q. For what consideration?

A. Well, I supposed he would give me $500.00 for it.

Q. Was it your intention at the time you signed that to carry that out?

A. Well, I intended to take that for it if I could not get anything more out of it.

Q. If you could not get anything more out of it?

A. Yes.

Q. Did you tell him that?

A. No, I didn't.

Q. You were careful not to were you?

A. Yes.

Q. Why were you careful not to?

A. Well, I thought at the time may be that I could get more out of it.

Q. Why didn't you let him know that?

A. Well, I don't know exactly. I thought it was a little sum of money to get out of it, but still if I could not get any more I calculated to take it.

Q. Why didn't you tell him you calculated to try to get more from some one else if you could?

A. I didn't think there was any use.

Q. Wasn't it because you didn't think he would lend you the money?

A. No, I didn't think—well, yes, I guess that is—that would be the main thing. I supposed that he wanted the land. I knew that he wanted the land.

Twentieth. In overruling the objection of the said de-

109 fendant to the question asked of witness Henry Hudson.

Q. What was your intention as to what you would do with the land at the time you signed that?

And in permitting the witness to answer the same.

A. Well, I was going to sell it, of course, if I could. I took it up for speculation.

And also in overruling the same objection to each of the following questions and permitting the answers thereto.

Q. Sell it to whom?

A. Well, I was going to sell it to the highest bidder. I was calculating to make $1000.00 out of it if I could, and if I couldn't I would let it go to Mr. Gesner.

Q. What did you understand at that particular time as to whether you had agreed to sell it to Gesner or not?

A. Well, I don't know it was a kind of an agreement, a verbal one though.

Twenty-first. In overruling the objection of the said defendant to the question asked of Christian Feuerhelm.

Q. Now at the time you filed this paper—signed it—what was your intention as to what you were going to do with the land when you got title to it?

And in permitting the witness to answer the same.

A. Well, I thought it should go to Gesner.

Twenty-second. Error in admitting in evidence over the objection of the said defendant the final proof papers of the said witness Christian Feuerhelm, which said final proof papers were of like tenor and effect as those hereinbefore set forth of John Watkinds.

Twenty-third. In overruling the objection of the said defendant to the question asked of said witness Feuerhelm.

Q. What was your understanding when you left Gesner and when you filed on a claim as to whether you had promised
110 that you would let him have it when you got the title?

And in permitting the witness to answer the same.

A. Well, there was no real promising.

And also in overruling the objection of each of the following questions and in permitting the answers thereto.

Q. You didn't say that?

A. No, sir.

Q. But what was your understanding as to what he believed and what did you believe?

A. I believed nothing else but I went in to file on the claim.

Q. At the time you filed, did you intend to let Dr. Gesner have the land when you got the title—at the time you signed that paper—filing?

A. I guess I thought so.

Twenty-fourth. In overruling the objection of the said defendant to the question asked of witness Lettie Watkinds.

Q. What did he say?

And in permitting the answer to the same.

A. Well, he said that Mr. Biggs wanted us to go and take timber claims or something like that.

And also in overruling the objection of said defendant to each of the following questions and in permitting the answers to the same by the same witness.

Q. Do you remember what else he said about it as to what the terms were or anything of that sort, what you were to make out of it?

A. Well, my understanding was we would make about $75.00.

Q. And how were you to make it?

A. Well from Gesner and Williamson was my understanding.

Q. Is that what your husband told you?

A. I think so.

Q. Did he say what you were to do with the land when you got the title? Did your husband tell you what you were to do
111 with the land when you got the title?

A. Yes, sir.

Q. What did he say?

A. To sell it to Gesner & Williamson.

Twenty-fifth. In overruling the objection of the said defendant to the question asked witness Paul Frank.

Q. What controversy in regard to the grazing took place in 1902 between you and Williamson & Gesner's herders?

And in permitting the witness to answer the same.

A. I told them these fellows has this land rented and I would like to have the feed on those sections until Fall. They said we hadn't the lease yet, that it hadn't been issued, and we would have to wait, and that they told them to go ahead and feed it off until it was settled.

And in overruling said defendant's objection to each of the following questions and in permitting the answers thereto.

Q. Who told them?

A. Williamson and Gesner.

Q. By whom was *said* said?

A. Chester Starr.

Q. What position did he occupy with Williamson and Gesner?

A. They always referred me to Chester Starr, supposed to be running the sheep out there.

Twenty-sixth. In overruling the objection of the said defendant to the question asked of said witness Frank.

Q. Do you remember having a talk with Chester Starr in 1903 in regard to getting the lines of the range settled where Morrow and Keenan's sheep should feed?

And in permitting the witness to answer the same.

A. Yes, sir.

Twenty-seventh. In overruling the objection of the said defendant to the question asked of said witness Frank.

112 Q. What did he say in regard to that?

And in permitting the witness to answer the same.

A. Well, he told me they had all the water on these even sections, and he would not give any satisfactory answer, the first talk I had with him.

Twenty-eighth. In overruling the objection of the said defendant to the question asked of said witness Frank.

Q. Did he give you an answer?

And in permitting the witness to answer the same.

A. No, sir, he never give me any answer at all. I caught him in there on 17, and I says, "You folks have been in here trying to feed out this range——"

Twenty-ninth. In overruling the objection of the said defendant to the question asked of said witness Frank.

Q. What did he say to that?

And in permitting the witness to answer the same.

A. And I wanted to get an even show at it that year; and so we got together afterwards and made lines.

Thirtieth. In overruling the objection of the said defendant to the question asked of witness William Elliott.

Q. What was the talk between you and the doctor, what talk did you have with Dr. Gesner in regard to the leasing of these road sections in 15-19, if any talk at that time occurred?

And in permitting the witness to answer the same.

A. Well, at one time the doctor spoke to me about some sections the parties had leased there.

And also in overruling the same objection to each of the following questions and in permitting the answers thereto.

Q. What parties?

A. I believe it was Morrow & Keenan.

Q. What did he say about it?

A. Well, he said their time was abouy expired, and he
113 thought we ought to stand in and help lease it to keep out other stock; I told him I had all the road lands leased that my business would pay, and I was not able; I thought the others ought to help do that, and that I had my share of it leased, I thought as much as I was able to lease, something to that effect.

Q. What, if anything, did he say to you with reference to Morrow & Keenan grazing in there?

A. He just spoke about—he said other stock, sheep and everything was running in there, and we ought to have that leased because it was right there on the range, bordering on the range, and ought to have it leased, so as to have it ourselves; that we had the better right to it, being as it bordered right on the range, something to that effect.

Q. Did he say anything about Morrow & Keenan crowding him?

A. Yes, sir, I think he spoke about them crowding down.

Thirty-first. In overruling the objection of said defendant to the question asked of said William Elliott.

Q. The last killing was about 600 head of sheep belonging to Morrow & Keenan that were killed right in there on section 35 in 1904, was it not, right in about the northeast corner of Section 35?

And in permitting the witness to answer the same.

A. Yes, sir, I think it was right in there some place.

And also in overruling the objection of said defendant to each of the following questions and in permitting the answers thereto.

Q. That was in 1904?

A. Yes, that was 1904 when the sheep was killed.

Q. And right after that Morrow and Keenan got out of business there, didn't they, of running sheep up there?

A. Well, they had taken their sheep out shortly afterwards.

Q. Wasn't it right after that killing that Gesner wanted you to join with them in leasing those road sections that Morrow & Keenan had given up? Is not that what your talk applied to?

114 A. Well, I really think it was before that, that Doc spoke to me about it. I would not say positively just the time.

Thirty-second. In overruling the objection of the said defendant to the admission of each and all of the seven certain photographs taken by one A. B. McAlpin of different points on the timber claims of M. R. Biggs, one of the said defendants.

Thirty-second. Error in admitting over the objection of the said defendant each and all of the six photographs taken by said A. B. McAlphin on the claim of defendant Williamson so as to show different portions of said claim.

Thirty-fourth. Error in admitting over the objection of the said defendant photographs of the claims of several of the other applicants, such applicants being other than the defendants.

Thirty-fifth. In overruling the objection of the said defendant to the question asked of witness David Edgar.

Q. After looking at the memoranda, can you tell us as to the general character of the N.E. ¼ of 24-15, 18 E.?

And in permitting the witness to answer the same.

A. Yes, sir, I can give you a general idea. It is an open country with very little timber to speak of. It is a grass country.

Thirty-sixth. In overruling the objection of the said defendant to the question asked of witness David Edgar.

Q. What is the character of the whole of township 15-19, as to timber?

And in permitting the witness to answer the same.

A. What I saw of it, it does not amount to anything for the timber, I should think. That is what I saw of it.

Thirty-seventh. In overruling the objection of the said defendant to the question asked of witness David Edgar.

Q. What was the character of the Biggs claim?

And in permitting the witness to answer the same.

A. Well, it is open country, with some timber, a few trees,
115 scrubby nothing of any account.

Thirty-eighth. In overruling the objection of the said defendant to the question asked of said witness David Edgar.

Q. For lumber, what would you call the grade of the timber up there, the best of it?

And in permitting the witness to answer the same.

A. I would call it very poor, coarse.

Thirty-ninth. In overruling the objection of the said defendant to the question asked of said witness Edgar.

Q. Make an estimate of the amount of timber on the J. N. Williamson claim.

And in permitting the witness to answer the same.

A. I estimate the timber at 320,000 feet.

Fortieth. In overruling the objection of the said defendant to the admission of similar questions and similar answers concerning the amount of timber upon different claims taken by different applicants, and to the answer of the witness tending to show the amount of timber of each of said different claims.

Forty-first. In overruling the objection of the said defendant

to the testimony of one John C. Murray and one Williams Mitchell and each of them, each of whom testified along the same lines as the said witness Edgar.

Forty-second. In overruling the objection of the said defendant to the question asked of said witness William Mitchell.

Q. What did you hear him say?

And in permitting the witness to answer the same.

A. Dr. Gesner came into the hotel and Mr. Cooper said, "Hello, Doc, how is things getting along up there?" Those fellows don't seem to be wanting to tell all they know; they dassant tell all they know.

Forty-third. In overruling the objection of the said defendant to the admission of the final proof of and cross-examination of Laura Biggs, and final proof and cross-examination of Mrs.
116 Williamson, Ora F. Parker, Sarah Parker, —— Foster, Mrs. Foster, Josiah Hinkle, Chas. Graves and Maria Graves, and in admitting the final proof and in admitting the cross-examination of each of said persons and of the whole.

Forty-fourth. In overruling the motion of the said defendant for the striking out of all of the testimony in relation to the final proofs.

Forty-fifth. In overruling the objection of the said defendant to the question asked of witness Van Gesner.

Q. You own some school sections bordering on it, don't you, all the way round?

And in permitting the witness to answer the same.

A. I own part of a school section in township 14.

And in overruling the objection to the following question asked of said witness Van Gesner.

Q. Don't you own some school land on every section that borders on the forest reserve on the south side there?

And in permitting the witness to answer the same.

A. No, sir.

Forty-sixth. In overruling the objection of the said defendant to the question asked of witness Van Gesner.

Q. You do not?

And in permitting the witness to answer the same.

A. No, sir. I own in one school section.

Forty-seventh. In overruling the objection of the said defendant to the question asked of said witness Van Gesner.

Q. You only own in one?

And in permitting the witness to answer the same.

A. I only own in one school section.

Forty-eighth. In overruling the objection of the said defendant to the question asked of said witness Van Gesner.

Q. By your owning, I mean, don't you own an interest
117 with others in each school section, that is in each township bordering on the reserve along here?

And in permitting the witness to answer the same.

A. My understanding—I will explain. In township 14-19, we own part of a school section there, school section 36; I think that

adjoins on the reserve, and that is the only place I know where the line of the reserve is.

Forty-ninth. In overruling the objection of the said defendant to the question asked of witness, the defendant, John Newton Williamson.

Q. Mr. Williamson, do you know where the lines of the Forest Reserve cross directly north of 15-19? Do you know where the south boundary line of the Forest Reserve is? By forest reserve, I mean the lands withdrawn for that purpose, already withdrawn and withdrawn on July 28th, 1902.

And in permitting the witness to answer the same.

Q. What was the question—the Forest Reserve line?

Fiftieth. In overruling the objection of the said defendant to the question asked of witness Williamson.

Q. The south boundary of the Forest Reserve?

And in permitting and directing the witness to answer the same.

A. I couldn't say. There has been so many changes in there, and the last change that was made by the Department, there was a lot thrown out just north of 15-19, and I never did figure out just what portion of the original reserve area was thrown out and what was left in.

Fifty-first. In overruling the objection of the said defendant to the question asked of the said witness Williamson.

Q. I asked you about that that was recommended and withdrawn on July 28th, 1902?

And in permitting and directing the witness to answer the same.

A. I think it was about the middle of the section, just as
118 the map shows.

And also in overruling the objection of each of the following questions and in permitting each of the answers thereto.

Q. The middle of 14?

A. Of the township, yes.

Q. Of 14?

A. Yes, sir.

Q. In 14-19?

A. If my memory serves me right that is it.

Q. It ran through the middle of township 14-19 and then ran north along the east line of township 14-18 to the north line of township 14, and then west along the north line of township 14?

A. Something like that but I think that was all thrown out.

Q. Oh, I can show you exactly how it stands if you want to see it. Threw out the timber and school sections that people had been taking up, didn't they?

A. I really don't know. I have heard a great deal about that, but I don't know what they finally did.

Q. Didn't it affect some that you had?

A. No, sir, not an acre, not an acre.

Q. It didn't?

A. Not an acre, sir.

Fifty-second. In overruling the objection of the said defendant to the question asked of said witness Williamson.

Q. Didn't you have an interest in some with Biggs? In the neighborhood of the reserve, the lines of the reserve, which were withdrawn on July 28th, 1902. Didn't you have an interest in some school sections with Boggs and Gesner?

And in permitting and directing the witness to answer the same.

A. Not in that section of the country.

Fifty-third. In overruling the objection of the said defendant to the question asked of said witness Williamson.

119 Q. Did you have any in Crook County in connection with Boggs and Gesner?

And in permitting and directing the witness to answer the same.

A. I am not certain; there might have been a section or two. There might have been some. I have forgotten where that land is, but I think there was some next the line.

Fifty-fourth. In overruling the objection of the said defendant to the question asked of said witness Williamson.

Q. Boggs secured the application for those in Prineville, for you in July, 1902, didn't he?

And in permitting and directing the witness to answer the same.

A. No one ever secured any application for me.

Fifty-fifth. In overruling the objection of the said defendant to the question asked of said witness Williamson.

Q. Didn't you agree with Dr. Gesner that he could secure people to take up that section 16 and pay for the land out of the firm moneys, in June?—in June while you were there—in June of 1902?

And in permitting and directing the witness to answer the same.

A. I dont' remember anything of the kind.

Fifty-sixth. In overruling the objection of the said defendant to the question asked of said witness Williamson.

Q. Didn't you agree with him that he could furnish the money to pay for the northeast quarter of section 16 in 15 S. of range 19 E. for Mary A. Swearingen, and wasn't the money furnished, with your knowledge, on June 24th, 1902, $200, and isn't that the $200 that appears in this bank account of Williamson, Wakefield & Gesner of that date?

And in permitting and directing the witness to answer the same.

—. I don't remember anything of the kind, I don't recall it. We may have done it. We might have talked of those matters. I don't say we didn't, but I don't recall it.

Fifty-seventh. In overruling the objection of the defend-

120 ant to the question asked of said witness Williamson.

Q. Didn't you agree with Dr. Gesner that he could pay $50 to any applicant for 320 acres, $25 for each quarter, to secure that section 16?

And in permitting the witness to answer the same.

A. I don't remember that, I don't remember of making any such agreement with Dr. Gesner.

Fifty-eighth. In overruling the objection of the said defendant to the question asked of said witness Williamson.

Q. Then Mr. Williamson, on June 24th I call your attention to

the entry on the debit side of Williamson, Wakefield & Gesner's account of the First National Bank of Prineville, Oregon, and entry of June 24, 1902, $200; and I call your attention to a certified copy of a letter by J. J. Smith, County Clerk at Prineville to M. L. Chamberlain, Clerk of the State Land Board, inclosing an application to purchase State land of Mary A. Swearingen and a draft of $200 in full payment for the same. Now, with those two things to refresh your memory, didn't you have a talk with Dr. Gesner prior to June 24 and in June, while you were up there on that trip, in which it was agreed that he could use the firm money and secure somebody to apply for section 16, township 15-19 from the State for school-lands and pay a consideration to the person for filing upon it?

And in permitting and directing the witness to answer the same.

A. I don't remember anything about that transaction in general. There might have been something said about it, but I don't recall it.

Fifty-ninth. In overruling the objection of the said defendant to the question asked of said witness Williamson.

Q. I call your attention to a certified copy of a letter from Dr. Gesner to M. L. Chamberlain, Salem, Oregon, of date June 23, 1902, inclosing a check for $80 for payment on the west half of section —.

And in permitting the witness to answer the same.

A. I never saw the letter before.

121 Sixtieth. In overruling the objection of the said defendant to the question asked of said witness Williamson.

Q. Do you remember having any conversation with Dr. Gesner in June 1902, in relation to his having his sister, Mrs. S. M. Gerowe take up a portion of that section 16 in township 15-19 for the firm?

And in permitting the witness to answer the same.

A. I don't remember anything of the kind having occurred when we were there in June, when I was there in June.

Sixty-first. In overruilng the objection of the said defendant to the question asked of witness Campbell Duncan.

Q. Mr. Duncan, when you first saw Clarence Branton—the witness hereinbefore referred to, there (at the Adams ranch) what did he tell you, if anything, as to where he was going?

And in permitting and directing the witness to answer the same.

A. He said he was going to Idaho, on his road there.

Sixty-second. In overruling the objection of the said defendant to the question asked of said witness Campbell Duncan.

Q. And in that talk did Branton tell you that the reason he did not take up a claim was because there wasn't enough in it?

And in permitting the witness to answer the same.

A. Yes, sir.

Sixty-third. In overruling the objection of the said defendant to the question asked of witness William Adams.

Q. Well, did he state to you that he was going to Idaho at that time?

And in permitting the witness to answer the same.

A. Yes, sir.

Sixty-fourth. In overruling the objection of the defendant to the question asked of the said witness William Adams.

Q. I am talking about the time he was camped there. Did he then state to you that he was going to Idaho?

And in permitting the witness to answer the same.

122 A. Yes sir.

Sixty-fifth. In overruling the objection of the said defendant to the question asked of witness Frank Ray.

Q. And on that occasion, did he say to you that the reason he did not take a timber claim at that time that he was up there at the shearing plant was because there wasn't enough in it, or words to that effect?

And in permitting the witness to answer the same.

A. Yes, he did.

Sixty-sixth. In overruling the objection of the said defendant to the question asked of witness Van Gesner.

Q. Doctor, I will ask you to examine that certified copy of those letters, and you can examine the certificate also. The letter referred to was as follows:

"PRINEVILLE, OR., *June* 23, 1902.

M. L. Chamberlain, Salem, Or.

6-25" $80 Check. MY DEAR SIR: Inclosed find check for $80 for payment on the West half of section 16, T. 15 S. R. 19 E. containing 320 acres. My sister Mrs. S. M. Gerowe will forward the application as soon — she can sign it. Who has the S.E. ¼ of that section. Is it paid up on or is it subject to a new filing. Please let me know at your earliest convenience. I remain,

Yours respect-, VAN GESNER.

123 And in permitting the witness to answer the same.

A. I guess I wrote that letter.

Sixty-seventh. In overruling the objection of the defendant to the question asked of witness Van Gesner.

Q. You think you wrote that letter?

And in permitting the witness to answer the same.

A. Yes.

Sixty-eighth. In overruling the objection of the defendant to the question asked of witness Van Gesner.

Q. And received the reply that is attached there?

And in permitting the witness to answer the same.

A. I don't remember the reply; I don't remember anything about that.

Sixty-ninth. In overruling the objection of the said defendant to the question asked of witness Van Gesner.

Q. But you remember writing the letter?

And in permitting the witness to answer the same.

A. I remember writing some letter there.

Seventieth. In overruling the objection of the defendant to admitting in evidence a certified copy of the application of Sarah M. Gerowe to purchase the W. ½ of Section 15, Tp. 15 S. R. 19 E.,

dated 26th day of June A. D. 1902, together with the affidavit attached.

Seventy-first. In overruling the objection of the said defendant to the admission of a certified copy of a deed from the State Land Board to Williamson, Wakefield & Gesner for the same, bearing date the 21st day of August, 1902.

Seventy-second. In overruling the objection of said defendant to the admission of a certified copy of the letter hereinbefore specified.

Seventy-second (*a*). In compelling the defendant Van Gesner to be recalled for further cross-examination after the close of defendant's case and after the opening of the Government's case in rebuttal, and in compelling him to answer the following questions:

124 Seventy-third. In overruling the objection of the said defendant to the question asked of witness Van Gesner.

Q. Doctor, in Prineville, between the 15th day of June, 1902, and the 25th day of June, 1902, did you have a conversation with Lawrence T. Perry, in that conversation, did you ask him to sign a school land application and an assignment of the same to the firm of Williamson & Gesner, or Williamson, Wakefield & Gesner, and state to him that the land was up in Horse Heaven country; and did he ask you how much there would be in it for him, and did you answer $50; and did he then say, if he took up any school land, he would keep the land for his own use, and walked off and did you say, as he was walking off, that it would be no trouble, "all you would have to do would be to go to the office and sign a paper," or words to that effect?

And in permitting and directing the witness to answer the same.

A. I will say I never had any such conversation with Mr. Perry as that, none whatever at any time, June, July or any time.

Seventy-fourth. In overruling the objection of the defendant to the question asked of witness Van Gesner.

Q. On or about June 24, 1902, in Prineville, did you ask Mary W. Swearingen to file upon 320 acres of school land in section 16, township 15-19, in the Horse Heaven country and tell her that you would give her $50, if she would make the application and an assignment to Williamson & Gesner, or Williamson, Wakefield & Gesner, or words to that effect? Or did you tell her you would give her $25 for filing upon 160 acres, at the same time and place?

And in permitting and directing the witness to answer the same.

A. Why I think she filed on a piece of land up there, but there was no contract to sell it to me. She was keeping boarders there, and there was a vacant piece, and I told her she could make something out of that land by filing on it, and if she wanted to file on it, I would let her have the money, and I did let her have the money, I think, and she filed on the land, and I bought the land

125 of her.

But I had no contract with her before to buy, no specified sum or anything else.

Seventy-fifth. In overruling the objection of the said defendant to the question asked of witness L. T. Parry.

Q. Mr. Perry in Prineville, between the 15 and 26 of June, 1902, did Dr. Gesner ask you to sign a school land application and an assignment to the firm of Williamson, Wakefield & Gesner, or Williamson & Gesner, and did you ask him where the land was, and did he tell you it was up in the Horse Heaven country; and then did you ask him what there would be in it for you, and did he answer $50? And did you then tell him if you took up any school land, you would keep the land for your own use, and did you start to walk off, and did he then say, it would be no trouble, "All you would have to do would be to go to the office and sign a paper."

And in permitting the witness to answer the same.

A. I had a conversation with Dr. Gesner, but I am lost as to the date; I would not say as to the date you speak of.

Seventy-sixth. In overruling the objection of the said defendant to the question asked of witness L. T. Perry.

Q. Now answer the question.

And in permitting the witness to answer the same.

A. The conversation that occurred between Dr. Gesner and *my*self occurred in front of Temple's drug store. He asked me this question, if I didn't want to take up a piece of school land—— that conversation in substance and effect took place.

Seventy-seventh. In overruling the objection of the said defendant to the question asked of witness Mary A. Swearingen.

Q. Will you state to the jury the circumstances under which you signed that paper, how you came to do it?

And in permitting the witness to answer the same.

A. Well, there isn't much to it. The Doctor just came down and asked me if I would file on a piece of school land; so I told
126 him I would.

JUROR: I can't understand you.

A. I say that he came and asked me if I would file on a piece of school land. I told him that I would. I went there and filed on the land. He was to give me $25 for filing on the 160 acres, as well as I remember; I don't remember just the amount. So I went before the County Clerk, Mr. Smith, and filed on the school land.

Seventy-eighth. In overruling the objection of the said defendant to the question asked of witness Mary Swearingen.

Q. Now just what did he say when he said that he wanted you to file on it, just what did he say. Tell the whole thing.

And in permitting the witness to answer the same.

A. Well, I don't remember just how it was.

Seventy-ninth. In overruling the objection of the said defendant to the question asked of the witness Mary Swearingen.

Q. No; but the substance of it as you can recollect it.

And in permitting the plaintiff to answer the same.

A. Well, just as well as I remember he came down and he said that he would give my daughter and I $50 to file on a quarter section of a half section—something—I don't remember the amount;

but anyway when the time came and we went to the clerk's office, part of it had been taken or he didn't want part of it—something like that, or they didn't say it was for him at all. Just asked us to file on it. And so my daughter didn't file, I filed on it and he gave me $25.

Eightieth. In overruling the objection of the said defendant to the question asked of Mary Swearingen.

—. Now when you went up to file what did you do when you got before the clerk, how did you come to do there?

And in permitting the witness to answer the same.

A. Well, I din't remember why or how I came to go there.

Eighty-first. In overruling the objection of the said defendant to each of the following questions asked of the witness Mary
127 Swearingen and in permitting the witness to answer the same.

Q. When you went there did you have a description of the land.

A. No, sir.

Q. And when you got there did you tell the clerk what land you wanted?

—. The Description was there.

Q. He had it did he?

A. The clerk had it, yes, sir.

Eighty-second. In overruling the objection of the said defendant to the admission of the application of the said Mary Swearingen in evidence.

Eighty-third. In overruling the objection of the said defendant to the question asked of witness James Keenan.

Q. In 1902, were you threatened in any way by cattlemen in regard to running sheep?

And in permitting the witness to answer the same.

A. No, sir.

Eighty-fourth. In overruling the objection of the said defendant to the question asked of witness James Keenan.

Q. Were there any threats against you for running sheep in 16-19, in township 16, 19 east, 15 south, 1902?

And in permitting the witness to answer the same.

A. No, sir, not from the cattlemen.

Eighty-fifth. In overruling the objection of the said defendant to the question asked of witness James Keenan.

Q. Did you graze section 25 in 1902?

And in permitting the witness to answer the same.

A. Yes, sir.

Eighty-sixth. In overruling the objection of the said defendant to each of the following questions asked of said witness James Keenan and in permitting the witness to answer each of them.

Q. Did you in 1903 in regard to it?

128 A. No, sir.

Q. In 1904 did you graze section 25.

A. Yes, sir.

Q. How did they come to be on that section? Do you know where they were going, were they being moved at that time?

A. I think they were, but I would not be sure. I was not there.

Q. Had section 35 been grazed on prior to your sheep going on there in 1904.

A. Yes, sir.

Q. By whom?

A. By Williamson's sheep and by Gesner's.

Q. Had any sheep been lambed on there in the spring of 1904?

A. I could not say.

Q. What time of the year were your sheep killed?

A. August 19th.

Eighty-seventh. In overruling the objection of said defendant to the question asked of witness James Keenan.

Q. Did you have any understanding with the cattlemen in that vicinity as to whether you could graze on 25 in the summer of 1904 before your sheep were killed?

And in permitting the witness to answer the same.

A. Yes, sir, we were allowed to graze that every year before until Elliott informed me that so long as we observed those lines, there would be no trouble.

Eighty-eighth. In overruling the objection of said defendant to the question asked of witness James Keenan.

Q. Did you hear any objection from any source against your using it in 1904 prior to the killing of your sheep?

And in permitting the witness to answer the same.

A. No, sir.

Eighty-ninth. In overruling the objection of the said defendant to the question asked of witness James Keenan.

129 Q. What sort of country is that for sheep pasture in 15-19?

And in permitting the witness to answer the same.

Q. Well, I believe it is about the best I ever saw anywhere.

Ninetieth. In overruling the objection of the said defendant to the question asked of witness Gaylord.

Q. Was there a road running to it?

And in permitting the witness to answer the same.

A. Just a kind of a by-road where they had been using going in and out with their sheep supplies.

Ninety-first. In overruling the objection of the said defendant to each of the following questions asked of witness Gaylord, and in permitting the witness to answer the same.

Q. Could you drive in there anywhere with a wagon without a road?

A. Yes, sir, most of the way.

Q. Would you recognize the place where you were and do you recognize it in those photographs, or could you tell?

A. I don't know from a photograph of it whether I could or not. They don't look natural to me like the country would if I was there.

Q. Does that look more natural.

A. Yes, that looks more like it.

Q. Did you see (showing the photograph that you say looks more like it) did you see any timber there that was any larger sized

than that in the photograph? Was there any timber there larger than that appears to be?

A. Yes, there was some.

Q. How much.

A. There was no great sight of large timber there.

Q. How was that section as to whether it was open or not and as to grass?

A. Well, it was pretty fair grass range.

Q. How was it as to openings.

A. Why it is all open timber. There is no underbrush,
130 only just once in awhile a little pine thicket—something of that kind.

Ninety-second. In overruling the objection of the said defendant to the question asked of witness Thomas M. O'Connell.

Q. Now then how does the timber in 15-19 compare with the timber in 15-20 in a general way?

And in permitting the witness to answer the same.

A. Well, 15-20 is better timber.

Ninety-third. In overruling the objection of the said defendant to each of the following questions asked of said witness O'Connell and in permitting the witness to answer each and all of the same.

Q. How does the timber in 15-19 compare with the timber in 14-19?

A. Well, what I done in 14-19 I think that is better.

Q. Did you locate anybody in 15-19?

A. No, sir.

Q. Did you attempt to?

A. No, sir.

Q. How does that 15-19 compare with the other townships that you mention that you have cruised there?

A. Well, I didn't do very much work in that town. I had been in across the town.

Q. What is the character of the timber in a general way as you found it in going across the town?

A. Well, it was short and very scattering, of a coarse nature.

Ninety-fourth. In overruling the objection of the said defendant to the question asked of witness James Keenan.

Q. What sort of a country is that for sheep pasture in 15-19?

And in permitting the witness to answer the same.

A. Well, I believe it is about the best I ever saw anywhere.

Ninety-fifth. In overruling the objection of the said defendand to the admission in evidence of a deed identified by G. G. Brown witness as a deed issued by the State Land Board to Mary A.
Swearingen, of date June 24th, 1902, to the land applied
131 for by her, which deed is as follows:

"STATE OF OREGON:

"In consideration of Two Hundred Dollars paid to the State Land Board, the State of Oregon does hereby grant, bargain, sell and convey unto Mary A. Swearingen, the following described land, to wit: Situated in Crook County, Oregon; the Northeast quarter of

Section 16, Township 15 South, Range 19 East of the Willamette Meridian, containing 160 acres."

"To have and to hold the same unto said Mary A. Swearingen, her heirs and assigns forever.

"Witness the seal of the State Land Board, affixed this 26th day of June, 1902.

(Signed) T. T. GREER, *Governor.*
I. F. DUNBAR, *Secretary.*
CHARLES S. MOORE, *Treasurer.*"

Ninety-sixth. In overruling the objection of the said defendant to the admission in evidence of a deed issued by the State Land Board of the State of Oregon to J. M. Williamson, E. N. Wakefield and V. Gesner, of which the following is a copy:

"STATE OF OREGON:

In consideration of four hundred and 00/100 Dollars paid to the State Land Board, the State of Oregon does hereby grant, bargain, sell and convey unto J. M. Williamson, E. N. Wakefield and V. Gesner, the following described lands, to-wit: Situated in Crook County, Oregon; the West half of Section 16, Township 15 south, Range 19 East, of Willamette Meridian, containing 320 acres.

"To have and to hold the same unto said J. M. Williamson, E. N. Wakefield and V. Gesner, their heirs and assigns forever.

"Witness the seal of the State Land Board, affixed this 12th day of August, 1902.

[L. S.] "T. T. GREER, *Governor.*
F. I. DUNBAR, *Secretary.*
CHARLES S. MOORE, *Treasurer.*"

132 Ninety-seventh. The Court erred in instructing the jury in said cause as follows: "The offense is sufficiently proved if the jury is satisfied from the evidence, beyond a reasonable doubt, that two or more of the parties charged, in any manner or through any contrivance positively or tacitly came to a mutual understanding to accomplish a common and unlawful design, followed by some act done by any one of the parties for the purpose of carrying it into execution."

Ninety-eighth. The Court erred in instructing the jury in said cause as follows: "Every person who procures another to commit any perjury is guilty of subornation of perjury, and is punishable by fine or imprisonment."

Ninety-ninth. The Court erred in instructing the jury in said cause as follows: So much of section 3 as is material reads as follows: "That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication at the expense of such applicant, in a newspaper published nearest the location of

the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act; unoccupied and without improvements other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal; that upon payment to the proper officer of the
133 purchase money of said land, together with the fees of the register and the receiver, as provided for in the case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy two, the applicant may be permitted to enter said tract, and on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon."

Effect is to be given to the provisions of the law by regulations to be prescribed by the Commissioner of the General Land Office at Washington.

The first step, therefore, on the part of any person desiring to avail himself of the benefits of the law is the filing of a written statement which must be sworn to before the register or receiver, or which may be sworn to before a United States Commissioner, designating the particular tract which the applicant *desires to purchase* setting forth that the land is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements except for ditch purposes, nor as deponent verily believes, any valuable deposits of gold, silver, cinnibar, copper or coal; that deponent has made no other *application* under this act; that he does not *apply to purchase* the same on speculation but in good faith to appropriate the land to his own exclusive use and benefit; and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself. If a person taking the oath to such statement swears falsely in the premises the law subjects him to all the pains and penalties of perjury.

One Hundredth. The Court erred in instructing the jury in said cause as follows:

134 Now, when the sworn statement is filed, the register posts a notice of the application, embracing a description of the land, in his office for a period of sixty days, and furnishes the applicant a copy of the same for publication in a newspaper published nearest the location of the premises, for a like period of time. And it is provided by law, and by regulation duly made by proper authority and having the force and effect of law, that, after the expiration of said sixty days, the person or claimant desiring to purchase shall furnish to the register of the land office satisfactory evidence, among other things, that notice of the application prepared by the register was duly published in a newspaper as required by

the law; that the land is of the character contemplated in the act; that the applicant has not sold or transferred his claim to the land since making his sworn statement, and has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whomsoever, by which the title he may acquire from the Government, may inure, in whole or in part, to the benefit of any person except himself; and that he makes his entry in good faith for the appropriation of the land exclusively for his own use and not for the use and benefit of any other person.

One Hundred and First. The Court erred in instructing the jury in said cause as follows: But, as heretofore said, if he is not in good faith and has directly or indirectly made any agreement or contract in any way or manner with any persons by which the title he may acquire from the United States shall inure in whole or in part to the benefit of any person except himself, then he commits perjury in making his sworn statement, and in making a deposition that he has not done those things; and any person who knowingly and wilfully procured and instigates the person to make such sworn state-
135 ment or deposition is guilty of subornation of perjury.

Having now placed before you the timber and stone law and what it denounces, and what it permits, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of loaning money to applicants under it, and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves wilful and unlawful intent, even if such advice were an inaccurate construction of the law. But, on the other hand, no man can wilfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel. And especially in using the words therein "And in making a deposition that he has not done those things."

One Hundred and Second. The court erred in instructing the jury in said cause as follows: The essential questions then for your determination are, does the evidence show, beyond a reasonable doubt, that Williamson, Gesner and Biggs, or two of them, knowingly and intentionally, entered into an agreement or combination to induce or procure persons to apply to purchase and enter the lands as alleged, or some part of the lands charged in the indictment as lands subject to entry under the timber and stone act, after having first come to an agreement or understanding with such persons that they would convey the title which they might acquire to Williamson & Gesner, or either of them; and next, does the evidence satisfy you beyond a reasonable doubt, that these defendants, so combining and agreeing, intended that the persons, or some of the persons, whom they might procure or induce to make such entries should wilfully and deliberately, in making their sworn statements or appli-
136 cations to purchase such lands at the time of making the first paper called a sworn statement, or at the time of making

their depositions or sworn statements when they made their final proofs before the United States Commissioner, applying to purchase such lands, commit perjury by swearing falsely that their applications were not made on speculation, but in good faith to appropriate the lands to the exclusive use and benefit of the applicant or applicants, and that the applicant or applicants had not, directly or indirectly, made any agreement or contract in any way or manner, by which the title to be acquired from the United States should inure in whole or in part to the benefit of any persons other than himself or herself. And especially in using the words in said foregoing instruction, "or some of the persons," and also in using the words thereing "or at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner."

One Hundred and Sixth. The Court erred in refusing to give the following instruction to the jury at the request of the defendant:

In order to constitute perjury there must be a willful and corrupt making of a false statement and however false or untrue a statement may be, there can be no perjury if the person making the statement believes it to be true at the time of making it.

One Hundred and Seventh. The Court erred in refusing to give the following instruction to the jury requested by said defendant:

The suborning of perjury necessarily includes every element of actual perjury and in order to constitute that crime it is necessary that one person shall purposely and intentionally procure or induce another to commit perjury, that is to willfully and corruptly and intentionally swear to something which the party taking the oath does not believe to be true.

137 One Hundred and Eighth. In refusing to give the following instruction to the jury requested by said defendant:

If the defendants believed that the persons who were to make the statements in question could do so truthfully and without stating a falsehood, they would not be guilty of the crime charged, however much they may have been mistaken as to the law or the facts.

One Hundred and Ninth. In refusing to give the following instruction to the jury requested by said defendant:

If the defendants believed that the arrangement with the applicants for the land in question was within the law and that such applicants could truthfully make the statements in question, then they are not guilty of the crime charged, even if they were mistaken and the arrangement between them and the applicants were really in violation of law.

One Hundred and Tenth. In refusing to give the following instruction to the jury requested by said defendant:

Even if you should find that some one of the defendants intended to suborn perjury, or even actually did do so, that would not justify a conviction of the charge in this indictment unless you further find that two or more of these defendants, definitely planned and agreed among themselves to procure the alleged perjury.

One Hundred and Eleventh. In refusing to give the following instruction to the jury requested by said defendant.

Even if you find that perjury was committed by some one or more of the applicants in question, that would not justify a verdict of guilty unless you further find that at least two of the defendants conspired and agreed together to procure the perjury to be committed.

One Hundred and Twelfth. In refusing to give the following instruction to the jury requested by said defendant:

The defendants are not charged with defrauding or attempting to defraud the government, and therefore any mere attempt to evade the law upon their part (if there was any such attempt)
138 would not justify a verdict of guilty unless there was actually a conspiracy or agreement between them to procure perjury.

One Hundred and Thirteenth. In refusing to give the following instruction to the jury requested by said defendant:

If you have a reasonable doubt as to whether there was an agreement between the defendants to procure perjury to be committed, you should give them the benefit of the doubt.

One Hundred and Fourteenth. In refusing to give the following instruction to the jury requested by said defendant:

Letters and declarations of certain of the defendants have been admitted in evidence, but before you can consider them as against and other defendant you must be satisfied beyond a reasonable doubt by other evidence independent of such statements that there was a conspiracy between the defendant making the statement and such other defendant to commit the crime.

One Hundred and Fifteenth. In refusing to give the following instruction to the jury requested by said defendant:

An applicant for timber land has a right to file on it with the intention of selling it at a profit after he has acquired title, and such a filing would be for his own use and benefit, within the meaning of the law.

One Hundred and Sixteenth. In refusing to give the following instruction to the jury requested by said defendant:

So the mere intention to sell at a profit at some future time would not be "on speculation" within the meaning of the law.

One Hundred and Seventeenth. In refusing to give the following instruction to the jury requested by said defendant:

Even if the applicant expected to sell the land to some particular person whom he knew to be buying timber land in that locality, it would be no violation of the law unless there was an actual contract to make the sale.

One Hundred and Eighteenth. In refusing to give the
139 following instruction to the jury requested by said defendant:

An applicant for timber land has a right to borrow money to prove up on his land, and if necessary to mortgage the land to secure payment, and this would be no violation of the law.

One Hundred and Nineteenth. In refusing to give the following instruction to the jury requested by said defendant:

He may also loan money to applicants to enable them to prove

up, with the intention of buying it if possible, after title is secured, and if there is no actual contract, for the sale of the land, his action in so doing would be lawful.

One Hundred and Twenty-first. In refusing to give the following instruction to the jury requested by said defendant:

The charge in the indictment is that there was an agreement between the defendants, general in its character, to suborn *a large number of persons* to commit perjury. An agreement to suborn one or two persons only would not sustain the indictment even if it were proven.

One Hundred and Twenty-second. In refusing to give the following instruction to the jury requested by said defendant:

The fact that a Grand Jury has found an indictment in this case should not be permitted to influence you in the least. The Grand Jury may hear only one side of the case, and the defendants had no opportunity to appear before that body and cross-examine the witnesses, and as I have said its decision ought not to affect your judgment.

One Hundred and Twenty-third. In refusing to give the following instruction to the jury requested by said defendant:

140 If you find from the evidence that Gesner expressly refused to make a contract and did not intend to make any contract or agreement with the applicants for the purchase of the lands; the mere fact that he expected or intended to purchase it at some future time, and that the applicants or some of them intended to sell to him if they could not do better (if you find these to be the facts) would not make an agreement which would be in violation of the law.

One Hundred and Twenty-fourth. In refusing to give the following instruction to the jury requested by said defendant:

The charge in this indictment is that the oaths of the applicants in question was intended to be false in the matter of the alleged contract to convey to Gesner and Williamson and you must base your findings upon that charge alone.

One Hundred and Twenty-fifth. In refusing to give the following instruction to the jury requested by said defendant:

There is no charge in the indictment, that the alleged oath that the applicants were to take, were false as to the character of the land or as to the manner of obtaining the money with which to pay for it.

One Hundred and Twenty-sixth. In refusing to give the following instruction to the jury requested by said defendant:

Even if you should believe therefore that the applicant or some of them were inaccurate or testified falsely as to where or how they obtained the money to prove up on their claims, that alone would not be sufficient to sustain a verdict of guilty in this cause.

One Hundred and Twenty-seventh. In refusing to give the following instruction to the jury requested by said defendant:

So there is no charge in the indictment of any intended falsity in the oaths of the applicants as to the amount or quality of timber on the different claims, and even if you should believe from the

evidence that there was some inaccuracy or falsity in that
141 regard, in the oaths or proofs of some of the applicants that would not be sufficient to sustain a conviction.

One Hundred and Twenty-eighth. In refusing to give the following instructions to the jury requested by said defendant.

Indeed it is alleged in the indictment that the lands in question were "subject to filing under the timber and stone act" and this necessarily implies that they were chiefly valuable for timber and stone and you must assume for the purpose of this case that this is true. The indictment being based upon this theory the government is now estopped from claiming otherwise.

One Hundred and Twenty-ninth. In refusing to give the following instruction to the jury requested by said defendant:

The defendants are not charged with perjury in the matter of their own applications or final proofs and they are not on trial therefore as to such application and proofs. You cannot therefore find them either guilty or not guilty as to the matter of the statements made in the matter of their own claims.

One Hundred and Thirtieth. In refusing to give the following instruction to the jury requested by said defendant:

In such case the mere fact that one of the lawyers to whom he applied for advice, was included with him in this indictment would make no difference as to his rights in the matter.

One Hundred and Thirty-first. In refusing to give the following instruction to the jury requested by said defendant:

In this case the indictment charges conspiracy to suborn perjury in the matter of the sworn statement or application and not in the matter of the final proof.

One Hundred and Thirty-second. In refusing to give the following instruction to the jury requested by the defendant:

Experience in the administration of justice makes it proper for courts to advise juries that the testimony of an accomplice should be received with great caution, and should be carefully scrutinized.
This is because of the position which he takes, as confessing
142 contamination with guilt, and admitting participation in the very crime which he endeavors by his testimony to fix upon the person on trial.

One Hundred and Thirty-third. In refusing to give the following instruction to the jury requested by the defendant:

There has been evidence admitted tending to show the purchase of certain school lands by some of the defendants. Whether or not there was anything irregular or illegal in such purchases, the defendants are not now on trial therefor, and you cannot find them either guilty or innocent thereon.

One Hundred and Thirty-fourth. That the Court erred in overruling the motion of said defendant for a new trial and in not allowing the same.

One Hundred and Thirty-fifth. That the Court erred in overruling and denying the said defendant's motion in arrest of judgment upon the ground that the indictment does not state a crime and that it does not sufficiently or at all allege that this defendant or any of

the said defendants at the time of the alleged conspiracy or at all, knew that the matter to be sworn to by the persons alleged to be suborned, would be false, or that the defendants or either of them, then knew that the persons to be suborned or any of them, would know their statements to be false at the time they were made, or that the defendants knew or believed, that the persons to be suborned or any of them would knowingly or willfully or corruptly, take a false oath in reference to the matters alleged in the indictment or at all.

One Hundred and Thirty-sixth. That the Court erred in overruling said motion for arrest of Judgment and in not allowing the same, upon the ground that said indictment is so uncertain that it does not state a crime.

One Hundred and Thirty-seventh. That said Court erred in entering judgment against said defendant on said indictment,
143 because the same was not sufficiently certain and definite and did not charge a crime.

One Hundred and Thirty-eighth. That said Court erred in sentencing said defendant to pay a fine and to imprisonment without his first being adjudged guilty of the crime charged in the indictment or of any crime.

One Hundred and Thirty-ninth. That said Court erred in pronouncing sentence against said defendant.

One Hundred and Fortieth. That said Court erred in overruling the objection of the said defendant John Newton Williamson to the pronouncing of sentence, and especially to the pronouncing of a sentence of imprisonment, upon the ground that it would violate his constitutional right to freedom and exemption from imprisonment or arrest while attending sessions of Congress, or going to or returning from such sessions, and would interfere with his attendance at such sessions.

One Hundred and Forty-first. That said Court erred in sentencing said defendant John Newton Williamson to imprisonment for a term of ten months over his said claim of exemption and protest and objections thereto, upon the ground that he was a member of Congress, and that his constitutional immunity and exemption from arrest would be interfered with as aforesaid.

A. S. BENNETT,
H. S. WILSON,
Attorneys for Plaintiff in Error.
JOHN NEWTON WILLIAMSON,
Plaintiff in Error.

UNITED STATES OF AMERICA, *District of Oregon, ss:*

We hereby certify that the foregoing Assignments of Error
144 are made on behalf of the Petitioner for a writ of error herein, and are, in our opinion, well taken, and the same now constitute the Assignment of Errors upon the writ prayed for.

(Signed) H. S. WILSON,
A. S. BENNETT,
Attorneys for Plaintiff in Error.

Filed April 12, 1906.

J. A. SLADEN,
Clerk U. S. Circuit Court, District of Oregon.

5—98

145 And afterwards, to wit, on the 12th day of April 1906 there was duly Filed in said Court, a Supersedeas Bond of defendant J. N. Williamson, in words and figures as follows, to wit:

146 In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS, Defendants.

Supersedeas Bond.

Know all men by these presents, That we, John Newton Williamson, as principal, and B. F. Allen and Leo Friede, of the City of Portland, State of Oregon, as sureties are held and firmly bound unto the United States of America in the full and just sum of Two Thousand ($2,000.00) Dollars, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 12th day of April, in the year of our Lord, One Thousand Nine Hundred and Six.

Whereas, lately at the October Term, A. D. 1905, of the Circuit Court of the United States for the District of Oregon in the suit pending in said Court between the United States of America and John Newton Williamson, Van Gesner, and Marion R. Biggs, defendants, a judgment and sentence was rendered against the said John Newton Williamson, and the said John Newton Williamson has obtained a writ of error from the Supreme Court of the United States to reverse judgment and sentence in the aforesaid suit and a citation directed to the United States of America to be and appear in the Supreme Court of the United States at the City of Washington, district of columbia sixty days from and after the day of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said John Newton Williamson shall appear either in person or
147 by attorney in the Supreme Court of the United States on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his writ of error, and shall abide by and obey all orders made by the Supreme Court of the United States in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the Circuit Court of the United States for the District of Oregon on such day or days as may be appointed for the retrial by said Circuit Court and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the Supreme Court of the Unifed States; then the

above obligation to be void, otherwise to remain in full force, virtue and effect.

JOHN NEWTON WILLIAMSON. [SEAL.]
B. F. ALLEN. [SEAL.]
LEO FRIEDE. [SEAL.]

Signed, sealed and delivered in the presence of—
G. H. MARSH.
W. C. BRISTOL.

Signed, sealed and acknowledged this 12th day of April, A. D. 1906, before me,

[SEAL.]

J. A. SLADEN,
Clerk United States Circuit Court,
District of Oregon,
By G. H. MARSH,
Deputy Clerk.

UNITED STATES OF AMERICA, *District of Oregon, ss:*

I, B. F. Allen, being duly sworn, depose and say that I am a resident and freeholder within said District and that I am worth, in property situated therein, the sum of Two Thousand ($2,000.00) Dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

B. F. ALLEN.

148 Subscribed and sworn to before me, this 12th day of April, 1906.

[SEAL.]

J. A. SLADEN,
Clerk United States Circuit Court,
District of Oregon,
By G. H. MARSH,
Deputy Clerk.

UNITED STATES OF AMERICA, *District of Oregon, ss:*

I, Leo Friede, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and freeholder within said District, and that I am worth, in property situated therein, the sum of Two Thousand Dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

LEO FRIEDE.

Subscribed and sworn to before me this 12th day of April, 1906.

[SEAL.]

J. A. SLADEN,
Clerk United States Circuit Court,
District of Oregon,
By G. H. MARSH,
Deputy Clerk.

Filed April 12, 1906.

J. A. SLADEN,
Clerk U. S. Circuit Court
for District of Oregon.

149 And afterwards, to wit, on Thursday, the 12th day of April, 1906, the same being the 4th Judicial day of the Regular April Term of said Court; Present: the Honorable William B. Gilbert, United States Circuit Judge presiding, the following proceedings were had in said cause, to-wit:

150 In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS, Defendants.

Order Allowing Writ of Error.

At this time comes the defendant, John Newton Williamson, by H. S. Wilson and A. S. Bennett, his Attorneys, and presents to the Court his petition, praying for the allowance of a writ of error from the Supreme Court of the United States to the above entitled Court in the above entitled cause, and has submitted therewith his assignment of errors, and his bond for appearance in the sum of Two Thousand ($2,000.00) Dollars (that being the amount of bail heretofore fixed by this Court.)

Whereupon it is Ordered, that said bond be accepted and approved, and that the prayer of said petition be granted, and that the Clerk of this Court be, and he is hereby directed to issue the writ of error prayed for in said petition, and that sentence and execution in said cause be stayed until the final disposition of said writ in said Supreme Court of the United States.

Dated this 12th day of April, 1906.

WM. B. GILBERT,
Circuit Judge.

Filed April 12, 1906.

J. A. SLADEN,
Clerk U. S. Circuit Court for District of Oregon.

151 And afterwards, to wit, on Friday, the 13th day of April, 1906, the same being the 5th Judicial day of the Regular April Term of said Court; Present: the Honorable William B. Gilbert, United States Circuit Judge presiding, the following proceedings were had in said cause, to-wit:

152 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS, Defendants.

Whereas, the above named defendant, John Newton Williamson has filed a petition for a writ of error in the above entitled cause from the Supreme Court of the United States to the above entitled Court, and

Whereas, said writ has been allowed, and assignments of errors filed and citations issued and served, and a writ of error issued in said cause, and

Whereas, by reason of the absence from the District of the Judge who tried said cause, it is impossible to perfect and prepare the transcript therein within the time fixed by law and the rules of Court for the return of said writ;

Now, therefore, the time for returning said writ and for preparing and transmitting the record in said cause to the above named Supreme Court of the United States is hereby extended until the first day of July, 1906.

Dated at Portland in the above entitled District this 13th day of April, 1906.

WM. B. GILBERT,
Circuit Judge.

Filed April 13, 1906.

J. A. SLADEN,
Clerk U. S. Circuit Court for District of Oregon.

153 And afterwards, to wit, on Saturday, the 23d day of June 1906 the same being the 65th Judicial day of the Regular April Term of said Court; Present: the Honorable William B. Gilbert United States Circuit Judge presiding, the following proceedings were had in said cause, to-wit:

154 In the Supreme Court of the United States.

J. N. WILLIAMSON, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Now on this day it appearing that an amended bill of exceptions in the above entitled cause was served and filed and presented to Hon. W. H. Hunt, before whom the above entitled cause — tried in the court below within a time heretofore fixed by order of said Court and

Whereas, said Judge has not since been within the District of Oregon, and has not settled said bill of exceptions, and

Whereas, an order was heretofore given and entered extending the time for filing a transcript of the record in said cause in this Court to be the 1st day of July, 1906, and

Whereas, it appears that on account of the failure to settle said bill of exceptions it is impossible to prepare said transcript within said time.

Now therefore, it is ordered and adjudged that the time for preparing said transcript and record and filing the same in the above entitled Court and docketing the same therein, is hereby extended and enlarged to August 15th, 1906.

Dated this 20th day of June, 1906.

WM. B. GILBERT,
United States Circuit Judge for the District of Oregon.

Filed June 23, 1906.

J. A. SLAFEN,
Clerk U. S. Circuit Court for the District of Oregon.

155 And afterwards, to wit, on the 10th day of July 1906 there was duly Filed in said Court, a Bill of exceptions in words and figures as follows, to wit:

156 In the United States Circuit Court for the District of Oregon.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS, Defendants.

Be it remembered, That after the plea in abatement filed by the defendants Van Gesner and Marion R. Biggs, had been disposed of it was stipulated and agreed in open court between the attorney representing the United States and the Attorneys representing the said defendants Marion R. Biggs and Van Gesner, that the demurrer to the indictment theretofore interposed in this cause by defendant John Newton Williamson should stand and be taken and considered as the demurrer of the defendants Van Gesner and Marion R. Biggs and each of them, and should be submitted upon the brief and argument filed as to the aforesaid demurrer of Williamson, and thereupon the court overruled and denied the demurrer of each of said defendants Van Gesner and Marion R. Biggs and John Newton Williamson, and each of said defendants then and there excepted to such ruling and said several exceptions of said defendants was allowed. And be it further remembered, That the defendants having duly pleaded as shown by the record herein, and the cause being at issue the same came on for trial before Hon. W. H. Hunt, Judge, and a jury duly empaneled, the Government appearing by Francis J.

Heney, United States District Attorney and the defendants appearing by H. S. Wilson, and A. S. Bennett, their attorneys and thereupon the following proceedings were had:

157 The plaintiff offered evidence during said trial sufficient to go to the jury tending to prove each and every material allegation of the indictment.

At the commencement of the trial of the cause, one Ben Jones was placed upon the witness stand as the first witness for the Government, and having testified among other things to having signed and sworn to an application similar to the one set forth in the indictment, was asked this question: Q. "Now at the time you signed it and swore to it, did you intend to convey this land to Dr. Gesner for the consideration named by him to you, as testified by you, as soon as you obtained the title thereto? To which the attorneys of the defendant on behalf of each of the defendants separately objected as incompetent and immaterial and not binding in any way upon the defendants, but the court overruled the objection and permitted the witness to answer, to which ruling the defendants, each of them separately excepted, and thereupon the witness answered, said question, "Yes, sir." And thereafter it appearing that said witness had made final proof upon this said claim in December, 1902, this question was asked, "Mr. Jones at the time you subscribed this final proof paper what was your intention with reference to this land as to what you would do with it when you obtained the title?" To which the defendants objected as incompetent and immaterial and not in any way binding upon the defendants, but the objection was overruled, and the witness was permitted to answer, to which ruling the defendants excepted and their exception was allowed, and thereupon the witness answered, "Let Gesner have it."

The following is all the testimony of the aforesaid witness Ben Jones introduced at the trial.

158 B. F. Jones, a witness called on behalf of the Government, being first duly sworn, testified as follows.

Questions by Mr. Heney:

—. Mr. Jones, where do you reside?
A. Prineville.
Q. How long have you lived there?
A. About thirty years.
Q. Do you know the defendants in this case?
A. Yes, sir.
Q. How long have you known Mr. Williamson?
A. About twenty-five years, I think.
Q. Were your relations with him friendly or otherwise during that time?
A. I was always friendly with him.
Q. How long have you known Dr. Gesner?
A. Ever since he has been out there. I could not just tell you.
Q. Your relations with him friendly or otherwise?

A. I was always friendly with him.
Q. Have any business relations with him prior to June, 1902?
A. Yes, sir.
Q. What?
A. We were in the horse business.
Q. Were you at that time in the horse business together?
A. Yes, sir.
Q. As partners?
A. Yes, sir.

Q. In June, 1902, did you make a filing, or sometime in
159 1902, in the summer, did you make a filing upon a timber claim?

A. Yes, sir.
Q. State to the jury how you came to make the filing. Who, if anybody, spoke to you about it? Provided it was one of these defendants and what you did.
A. Dr. Gesner spoke to me about it in Prineville.
Q. State what he said.
A. Well, he said if I and my wife would go up there——
Mr. BENNETT: Said what?
A. If I and my wife would take a claim that he would give us $75 a piece when we proved up.
Q. Did he tell you where he wanted them taken?
A. Why, he said up there near the clipping corrals on the Wickiup.
Q. Is that what is called the Horse Heaven country?
A. Well, it is near there.
Q. Is it in Township 15?
A. Well, I couldn't tell you the number of the Township.
Q. Is that the section of the country where you did consequently file?
A. Why, I think so. It was in section 6.
Q. Well, I say is that part of the country that you are describing the part where you did consequently file?
A. Yes, sir.
Q. When you had this talk with Dr. Gesner, what did you say in reply to his proposition?
A. I told him that I would. Well, I don't know that I told him that I would that day, but the next time. I told him I would see my wife, I think. I don't remember just exactly the words I did tell him just then.
Q. After seeing your wife, did you say anything to him?
A. Well, I told him we would go ahead.

160 Q. And who told you when to go up there, if anybody?
A. Why, he told us.
Q. And did you go on the day he told you?
A. Yes, sir.
Q. Did he say anything about any others going?
A. He said there would be others there.
Q. Who went with you?
A. Joe Calavan and his wife and my wife and little boy.

Q. How did you go, all in one team?
A. We went up in a hack or rig of our own.
Q. What day was that? Can you place it about when?
A. There was different ones there. I couldn't just tell you how many there was there.
Q. I say what day was it: about what day was it?
A. Well, something like the last days of June. I couldn't just tell the day, I don't think.
Q. When you got up there, whom did you find there—when you got up to the shearing plant? You went to the shearing plant, did you?
A. Yes, sir.
Q. That is known as the Williamson and Gesner shearing plant?
A. Yes, sir. Gesner was there and there was others, but I don't know just who all was there. I wasn't very well that day.
Q. What talk, if any, was made by Gesner while you were up there, that you heard?

Mr. BENNETT: I should have objected when the evidence was first offered, but we want, as a matter of record, to make the same objection that we did in the first trial of this case to the admission of any evidence, for the purpose of saving our record. We object to the admission of this testimony or any proof upon the ground that the indictment does not state any crime in this case, and that
161 the statements which it is claimed were to be falsely sworn to, were not statements which a Commissioner had a right to take, or which the making of, or the conspiracy to make would be a crime, under the statute under which the prosecution is proceeding.
The objection is overruled.
Defendants allowed an exception.

Q. What statement, if any, was made in your presence by Dr. Gesner up there? Did you hear Dr. Gesner make a talk to a number of people?
A. No, sir. I was not there.
Q. You were not there?
A. No, sir. I wasn't there.
Q. Well, who, if anybody, spoke to you about what lands you were to look at or to file upon?
A. Why, Dr. Gesner.
Q. Up there at the timber?
A. Yes, sir.
Q. What did he say to you?
A. Why, he told I and my wife and Joe Calavan and his wife that we would all take claims in the same section.
Q. Did he tell you where to go to see it?
A. Yes, sir.
Q. Did you go there?
A. They went that evening and I went the next morning. I didn't go that evening. That is, I and my wife didn't go. Calavan and his wife went. And they went with us the next morning.
Q. Then, after that what did you do?

A. Well, we went home after we went out there.

Q. When did you file?

A. Why, just—I couldn't say when—just two or three
162 days or a day or two from that time. I couldn't say just the exact date.

Q. Before whom did you file?

A. Mr. Biggs.

Q. How did you get the description of the land that you were to file upon? Did anybody give you that?

A. Yes, sir.

Q. Who?

A. Why, Biggs had the description, I believe. He or Gesner, I couldn't say which. Of course I knew the land and had been over it before.

Q. Did you know it by description?

A. No, not till I went out and looked at it. The numbers of the land, I didn't know. Of course when I went out and looked over the land, why they told me that is where I went.

Q. Did you file upon it?

A. Yes, sir.

Q. Before whom?

A. Biggs.

Q. Is that your signature?

A. Yes, sir.

Mr. HENEY: We will offer this paper in evidence.

Mr. BENNETT: We object to this, your Honor, as incompetent upon our general objection. I suppose our general objection may cover all this testimony, and also we object to it as against all the other defendants except Biggs.

The objection is overruled.

Defendants except.

Mr. HENEY: This is a regular printed form of a timber and stone entry, headed "Timber and Stone Lands, Sworn Statement. Land Office at The Dalles, Oregon." I will read this one and then
163 there are quite a number of others that will be offered later and I won't read any of those except to state who the party was to file them, because they are all just the same. This is the same form used in all.

"Timber and Stone Lands—Sworn Statement.

LAND OFFICE AT THE DALLES,
OREGON, *June* 30, 1902.

I, Ben F. Jones, of Prineville, County of Crook, State of Oregon, desiring to avail myself of the provisions of the Act of Congress of June 3, 1878, entitled "An Act for the sale of timber in the States of California, Oregon, Nevada and Washington Territory" as extended to all the public land states by act of August 4, 1892, for the purchase of the N. W. ¼ of Section 6 township 15 S., of range 19 E. W. M. in the district of lands subject at The Dalles, Oregon, do

solemnly swear that I am a native citizen of the United States, of the age of 45, and by occupation farmer; that I have personally examined said lands, and from my personal knowledge state that said land is unfit for cultivation and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, as I verily believe, any valuable deposits of gold, silver, cinnabar, copper or coal; that the land contains no salt spring or deposit of salt in any form sufficient to render it valuable therefor; that I have made no other application under said act; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons, whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself, and that my Post Office address is Prineville, Or.

BEN F. JONES, *Applicant.*

STATE OF OREGON, *County of Crook, ss:*

164 I, M. R. Biggs, do hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this 30th day of June, 1902.

M. R. BIGGS,
U. S. Commissioner,
Residing at Prineville, Oregon.

Q. Mr. Jones, at the time you signed this application were you sworn by Mr. Biggs?

A. Yes, sir.

Q. Was this paper read to you?

A. I think it was.

Q. Now, at the time you signed it and swore to it, did you intend to convey this land to Dr. Gesner for the consideration named by him to you, as testified by you, as soon as you obtained the title thereto?

MR. BENNETT: Now, may it please your Honor, we desire to object to that upon the ground that the intention of this witness is not binding in any way upon the defendants.

COURT: The witness may testify to all the acts, all the conversation and the circumstances, and he may also testify to his intention, if it be a material element involved.

Defendants except to the ruling.

A. Yes, sir.

Q. What was your belief at the time you signed and swore to this, as to whether or not this statement in the paper was true: "I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and

165 benefit, and that I have not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States, may inure, in whole or in part, to the benefit of any person except myself?"

A. Well, if I had got the $75, it would have been for my benefit, wouldn't it?

Q. The $75 would have been yes.

A. Yes.

Q. But what was your belief as to whether the purpose with which you were taking the land was to have the land for your own special use and benefit?

A. Well, I had agreed to have taken that from Gesner, of course; I admit that; that I did agree to take it from him.

Q. Then you knew at the time that this statement wasn't true?

A. Yes, sir.

Q. Did your wife file before Biggs?

A. Yes, sir.

Q. Is that her signature?

A. Yes, sir.

Q. These filing papers are made in duplicate. Is that her signature also?

A. Yes, sir.

Q. Did you see her sign the two papers before Biggs at that time?

A. Yes, sir.

Q. Were the papers read to her?

A. Yes, sir. They were.

Q. Now, before that time, had you told your wife that the agreement was that you had made with Gesner?

A. Yes, sir.

Q. Or what the talk was you had with him?

Objected to as incompetent, immaterial and hearsay.

166 Mr. HENEY: The testimony is that Gesner told this man that if he and his wife would file, he would give them $75 each and he says that he said he would see his wife, and that he did see her, and then went back and said they would.

Objection overruled.

Mr. BENNETT: We make this objection as to each of the defendants, your Honor, and take an exception as to each of them.

Q. The question is, did you tell your wife what Dr. Gesner had told you?

A. Yes, sir.

Q. What was it you told her then?

A. I told her that he would give us $75 apiece.

Mr. BENNETT: Same objection. I suppose our objection may go to all of this.

COURT: If the ruling is correct upon the admissibility of the testimony, upon the theory that he was acting as the agent of the defendants, then what he said, of course, would be competent, and

the objection, if it is well taken to the first, would be well taken to the second.

Q. The land described in this paper that she filed on, do you know where the numbers came from? Did you get them for her or where did they come from?

A. I think Mr. Biggs had the numbers for the two of us.

Q. It was either Biggs or Gesner furnished them, was it?

Mr. HENEY: We will offer this paper in evidence.

Mr. BENNETT: Our objection goes to that.

The paper is marked "Plaintiff's Exhibit 2" and by consent of counsel for defendants, is considered read.

Mr. HENEY: The date of the filing of Mrs. Nancy Jones is June 30th, 1902, and is certified before Biggs.

167 Q. At the time you filed, did you pay any filing fee?

A. No, sir.

Q. What was said by Mr. Biggs, if anything, about the payment of a filing fee to you, by your and your wife?

A. Why, he said Gesner would fix that.

Q. Was anything said about the payment of a publication notice—cost of publishing?

A. No, sir.

Q. Did you have anything to do with the publication of it?

A. No, sir.

Q. Was it published, do you know?

A. Yes, sir.

Q. And after that publication, you made final proof, did you?

A. Yes, sir.

Q. Before whom?

A. Biggs.

Q. Did your wife also make final proof?

A. Yes, sir.

Q. Now, at the time that you made final proof before Biggs, what, if anything, was said by him or by you, in relation to the payment of the money for the land, $400 purchase price to the Government?

A. Why, Gesner would furnish the money.

Q. What was said there? Did Biggs say anything?

Mr. BENNETT: We object to that on the part of each of the defendants as incompetent.

Objection withdrawn.

Q. Mr. Jones, at the time of final proof, what was said about the payment of the money?

A. What did he say, you mean?

Q. Yes, what did Biggs say. What was said about the

168 final proof money at the time of making final proof, if anything?

A. He said Gesner would furnish the money.

Q. And you brought no money to him?

A. No, sir.

Q. Either for yourself or your wife?
A. No, sir.
Q. And your wife brought none either?
A. No, sir.
Q. And did you sign any note or mortgage for the money?
A. No, sir. I did not.
Q. At the time of making final proof were you sworn by Mr. Biggs?
A. Yes, sir.
Q. And was your wife sworn in your presence?
A. Yes, sir.

Mr. HENEY: I want to offer this final proof testimony at this time.

Q. Is that your signature?
A. This is here, yes. That ain't.
Q. Look at it and see if that is the paper you signed when making final proof.
A. Yes, sir. This is the paper.

Mr. HENEY: We will offer that in evidence.
Marked "Plaintiff's Exhibit 3."

Q. And is this your signature?
A. Yes.

Mr. BENNETT: Is that the cross examination?
Mr. HENEY: Yes.

Q. Is that one of the papers you signed at the time of making final proof?
A. That is one of them.

169 Mr. HENEY: We will offer that in evidence.
Marked "Plaintiff's Exhibit 4."

Mr. HENEY: This is a printed form of the final proof testimony, headed "Timber and Stone Lands. Form 4-370. Testimony of Claimant.

"BEN F. JONES, being called as a witness in support of his application to purchase the northwest quarter of section 6, Township 15, south of range 19, East W. M., testifies as follows:

Question 1. What is your age, postoffice address, and where do you reside?

Answer. 45 years; Prineville, Oregon; Crook County, Oregon.

Ques. 2. Are you a native born citizen of the United States, and, if so, in what State or Territory were you born?

Ans. Native born. Oregon.

Ques. 3. Are you the identical person who applied to purchase this land on the 3rd day of July, 1902, and made the sworn statement assigned by law before the United States Commissioner, on that day?

Ans. Yes. Yes.

Ques. 4. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivision-?

Ans. Yes.

Ques. 5. When and in what manner was such inspection made?

Ans. In June, 1902, by running over the land and examining the timber and soil.

Ques. 6. Is the land occupied; or are there any improvements on it not made for ditch or canal purposes, or which were not made by or do not belong to you?

Ans. No. No.

Ques. 7. Is the land fit for cultivation, or would it be
170 fit for cultivation if the timber were removed?

Ans. No. No.

Ques. 8. What is the situation of this land, and what is the nature of the soil, and what causes render the land unfit for cultivation?

Ans. It is hilly and broken and very stony. Soil is very slight and poor. Covered with timber.

Ques. 9. Are there any salines, or indications of deposits of gold, silver, cinnabar, copper or coal on this land? If so, state what they are, and whether the springs or mineral deposits are valuable.

Ans. Not that I know of.

Ques. 10. Is the land more valuable for mineral or any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone?

Ans. No. Yes.

Ques. 11. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. From the fact that it is stony and rough and could not be cultivated and from fact that timber is heavy and very valuable.

Ques. 12. What is the estimated market value of the timber standing upon this land?

Ans. From 50 cents to 75 cents per thousand feet.

Ques. 13. Have you sold or transferred your claim to this land since making your sworn statement; have you directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which you may acquire from the government of the United States may inure, in whole or in part, to the benefit of any persons except yourself?

171 Ans. No.

Ques. 14. Do you make this entry in good faith for the appropriation of the land exclusively to your own use and not for the use or benefit of any other person?

Ans. Yes.

Ques. —. Has any other person than yourself, or has any firm, corporation or association, any interest in the entry you are now making, or in the land, or in the timber thereon?

Ans. No.

BEN F. JONES.

I hereby certify that the above named Ben F. Jones, personally appeared before me; that I verily believe affiant to be the person he

represents himself to be; and that each question and answer in the foregoing testimony was read to him in my presence before he signed his name thereto, and that the same was subscribed and sworn to before me at Prineville, Oregon, this 6th day of December, 1902.

M. R. BIGGS,
U. S. Commissioner for District of Oregon.

NOTE.—Every person swearing falsely to the above deposition is guilty of perjury and will be punished as provided by law for such offense. In addition thereto, the money that may be paid for the lands is forfeited, and all conveyances of the land or of any right, title or claim thereto are absolutely null and void as against the United States.

I hereby certify that I have tested the accuracy of affiant's information and the *bona fides* of this entry by a close and sufficient oral cross examination of the claimant and his witnesses, directed to ascertain whether the entry is made in good faith for the
172 appropriation of the land to the entryman's own use and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agree- to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure in whole or in part to the benefit of any person or persons except himself, and am satisfied from such examination that the entry is made in good faith for entryman's own exclusive use and not for sale or speculation, nor in the interest nor for the benefit of any other person or persons, firm or corporation.

M. R. BIGGS,
U. S. Commissioner for District of Oregon.

Then the paper on the back of it when folded is the following:

"Timber Land.

Acts of June 3, 1878 and August 4, 1892.

Testimony of Claimant.

Land Office at The Dalles, Oregon.
Section 6.
Township 15 S.
Range 19 E. W. *W.*"

Mr. HENEY: It is admitted that the signature purporting to be the signature of M. R. Biggs on the application and final proof papers that are admitted in evidence, is the signature of M. R. Biggs.

Recess taken until 2 o'clock.

173 SEPTEMBER 8, 1905—2 p. m.

B. F. JONES resumes the stand.

Direct Examination continued.

Questions by Mr. HENEY:

—. At the time that you made this final proof, Mr. Jones, did Mr. Biggs say anything to you about the making of a note or mortgage?

A. No, sir.

Q. Do you remember any conversation as to whether you were to make one at that time?

A. No, sir. I was not to make any.

Q. You weren't to make one. But do you recall any conversation about it with Biggs?

A. I don't remember about any with Biggs.

Q. Do you remember having one with any one else?

A. Why, I and Gesner talked about the money proposition as far as that is concerned.

Q. When?

A. Why, at the time I was to file on the timber. He was to furnish the money.

Q. What did he say about that?

A. Well, he said he would furnish me the money.

Q. And how about your wife?

A. He would furnish her.

Q. Was that in the same talk where he said he would pay the $75?

A. Yes, I think it was.

Q. Now, at the time you made this final proof what was your intention as to what you would do with the land when you got title to it?

Same objection.

COURT: It goes in subject to the same objection. I un-
174 derstand the objection to apply to this question also.

Mr. BENNETT: I think this is a little different from the other, your Honor. It goes to the matter of what his intention was at the time of the making of final proof and it may be that it depends upon that other question that has been holding back so that we would have some chance to present the authorities to your Honor.

COURT: Mr. Heney, do you contend that even if the construction must be put upon the indictment that the conspiracy charged was only on making that application to enter, that this would still be admissible testimony?

Mr. HENEY: I believe that it would be, if your Honor pleases, as tending to throw some light upon the question as to what the intent of the party was at the time the original entry was made; that it is a part of the *res gesta* of the transaction. If perjury was suborned for the original statement, the purpose of it was to secure title to the land for Gesner, and that anything done that could have been in contemplation of the parties at the time, is necessary to be done in order to complete that purpose would be a part of the transaction,

which would be competent evidence to show the intent with which the other part was done.

COURT: I am inclined to think that that is the correct rule; on general principles I think that would be the correct view to take of it; unless there is some rule that would be different applicable to this particular charge, I should so hold.

Mr. BENNETT: I had supposed that the decision of Judge De Haven in the matter had become the law of the case in all these questions, whether favorable or unfavorable, and therefore, I am not prepared at this time to present this matter carefully.

(Argument.)
Objection overruled.
Defendants except.

175 Q. Mr. Jones, at the time that you subscribed this final proof paper, what was your intention with reference to this land as to what you would do with it when you obtained the title?

Same objection.
Objection overruled.
Defendants except.

A. Let Gesner have it.
Q. Under that agreement?
A. Yes, sir.
Q. After you had made your final proof, did you receive money back from the Land Office?
A. Yes, sir. Checks.
Q. One for yourself and one for your wife?
A. Yes, sir.
Q. Are those the checks and is that your signature on one of them and here on the other?
A. This is mine and this is hers.
Q. Did you receive a letter with those?
A. I couldn't say. I don't believe I did.
Q. You don't remember what you did with it if you had one?
A. No. I don't remember. There might have been a note in there with it from the Land Office. I believe there was.
Q. Yes. I *am* from the Land Office?
A. Yes, sir.
Q. These came to you from the Land Office by mail?
A. Yes, sir.
Q. What did you do with them when you got them?

(JUROR:)

Q. From the land office at The Dalles?
Mr. HENEY: Yes. The date of this is January 25, 1904. Both of these checks.

176 Q. At the time these were returned to you had you given any indication to the Land Office or Land Officers, in any way, that you did not desire to go ahead with that entry?

A. At that time?
Q. Yes.
A. No, I had not.
Q. Now then you received these from the Land Office?
A. Yes, sir.
Q. And what did you do with them when you got them?
A. I put them in the bank there at Prineville, the First National Bank, to Gesner's credit.
Q. Did you see him before doing so? Talk with him any?
A. I don't remember whether I did or not, now.

Mr. HENEY: We will offer these two checks in evidence. That is the amount paid to the Land Office, $411 on each check, and it is — check of Anne M. Lange as Receiver of the Land Office at The Dalles, payable, the first one to B. F. Jones, endorsed B. F. Jones, and there are several banks' stamps on there.
Marked "Plaintiff's Exhibit 5."
Mr. HENEY: The second one is the same way, "Pay to Nancy D. Jones." Same date, January 25, 1904, $411. Anne M. Lange, Receiver. Endorsed Nancy D. Jones.
Marked "Plaintiff's Exhibit 6."

Q. Have you done anything further with reference to the land since?
A. No, sir.
Q. Have you received a patent for it yet?
A. No, sir.
Q. Is that the signature of your wife?
A. Yes, sir.
177 Q. Is that one of the papers she signed before Biggs at the time of making final proof?
A. Yes, sir.

Mr. HENEY: We will offer that cross examination along with the other paper for her final proof.

Testimony of claimant, Nancy D. Jones, is marked "Plaintiff's Exhibit 7," and the cross examination, "Plaintiff's Exhibit 8."

Q. Is that her signature upon this paper? (Exhibit 7).
A. Yes, sir.
Q. Is that one of the papers signed by her before Biggs, at the time of making final proof?
A. Yes, sir.
Q. Were each of your sworn to these papers?
A. Yes.
Q. By Biggs?
A. Yes, sir.
Q. At the time you subscribed them, at the time you signed them?
A. Yes.

178 Cross-examination.

Questions by Mr. BENNETT:

—. Mr. Jones, are you acquainted with Mr. Neuhausen?

A. Yes, sir, slightly.

Q. Pretty well acquainted with him?

A. Just tolerably. I have met him several times.

Q. Are you acquainted with Mr. Burns?

A. I have met him a few times.

Q. About how many times have you met Mr. Burns and Mr. Neuhausen?

A. Well, I couldn't tell you how many times.

Q. In the last two or three months?

A. I couldn't tell you how many times.

Q. About how many times? You say a few times: do you mean two or three, or a hundred times?

A. Oh, 25 or 30, I guess.

Q. 25 or 30 times?

A. I don't know just how many. You knew what time I have been down here.

Q. You have been around where they were a good deal?

A. Oh, I have been around the Court House here quite a good deal.

Q. Do you know Mr. Mitchell, a Government detective?

A. Mitchell? A small fellow?

Q. Yes?

A. Yes, I have met a man by that name.

Q. Have you met him a good many times in the last three or four months?

A. Why, I have saw him a few times; I couldn't say how many times.

179 Q. Well, about how many, in the same general way that you said about these other men?

A. I don't know. I have met him out at Prineville, and I have met him here. I couldn't say how many times I have met him, I don't believe; I haven't met him as often as I have Neuhausen.

Q. You haven't met him as often as you have Neuhausen?

A. No, sir.

Q. Probably 15 or 20 times?

A. Likely that many; I couldn't say for sure.

Q. And Snelling—do you know him? Another Government detective?

Mr. HENEY: I object on the ground that that is putting a conclusion in that he is a Government detective.

COURT: I think that you had better separate that, Judge, and ascertain, first, what the business or calling of the individual is, if this witness knows. Your question doesn't call for any answer to that part of it, but calls for an answer as to whether or not he is acquainted with this man whom you have characterized in that way. I think, technically, that objection is well taken.

Q. Do you know a man by the name of Snelling?
A. No, sir, I don't think I do; not by that name, I don't know him.
Q. What say?
A. I don't know a man by that name here.
Q. You don't know a man by that name?
A. No, sir, I do not. I might know him but not know his name.
Q. Do you know any other Government detectives, that you know of?

Mr. HENEY: I object, upon the ground that it is assuming that he knows one Government detective. There is no evidence that he knows any.

180 Objection sustained.
Defendants except.

Q. Do you know any Government detective?
A. I don't know that I do. They might be detectives. I don't know nothing about it.
Q. Are you in the employ of the Government?
A. No, sir; nothing more than a witness.
Q. You say that you haven't been assisting the Government in this prosecution?
A. I am a witness; that is about all.
Q. Well, any other way?
A. No, sir.
Q. You haven't been assisting them in the matter of looking up testimony?
A. I don't know nothing about it.
Q. Well, you haven't been assisting them in that matter—in the matter of looking up testimony and finding out what people would swear to?
A. No, sir, I don't think I have.
Q. Well, you know whether you have or not, don't you?
A. I don't remember telling them about anyone. I might have told them something, but then it didn't amount to nothing, I guess.
Q. Have you been in frequent consultation with Mr. Burns?
A. What was that?
Q. And Mr. Neuhausen in relation to the case?
A. What was that?
Q. Have you been in frequent consultation with Mr. Burns or Mr. Neuhausen in relation to the case?
A. Oh, I have talked with them.
Q. A good many times.
A. I have talked with Neuhausen. I never talked to Mr.
181 Burns to amount to anything about the case.
Q. Haven't you talked with Mr. Burns? Haven't you been in consultation with Mr. Burns about different features of the case?
A. Oh, I may have talked about them.
Q. Haven't you been in the habit of going up into the room where the witnesses were being kept, and holding whispered consultation with Mr. Burns?

A. I have talked with Mr. Burns in regard to Smith. That is,—he talked with me about it—Sam Smith.

Q. You had a whispered consultation with him?

A. He told me in regard to Smith.

Q. Well, I ask, was it in whispers that you talked with him?

A. Well, I couldn't say; it might have been; I understood it all right.

Q. How many times did you have whispered consultation with him or Mr. Neuhausen, about matters in connection with this case?

A. I don't know that I have whispered at all. I might have.

Q. You say you might?

A. Yes.

Q. But you don't know whether you did or not?

A. I know I have talked with him.

Q. Don't you remember whether you have held whispered talks with them?

A. I don't remember how that was. I might not have made much noise when I talked.

Q. Isn't it a matter of fact that you have gone up there and held a number of whispered consultations with these gentlemen?

A. I might have talked with them several times; I couldn't remember.

Q. In whispers?

A. No, I don't remember about whispering to them.

Q. Don't remember whether you did that or not?

A. No, I never cared much whether anybody heard me or not. I just talked to them.

182 Q. Have you been helping herd the witnesses together?

A. No, sir. I didn't get pay for that, I didn't think.

Q. Well, you were offered a job of detective or deputy-marshall, weren't you?

A. By who?

Q. By some of these people on behalf of the Government?

A. Who were they?

Q. Well, I don't know; I am asking you if you were?

A. Well, I don't know either.

Q. Well, you mean by that that you weren't offered such a job?

A. I haven't been offered no jobs.

Q. After you went home last time did you see Champ Smith?

A. Yes, sir.

Q. Had a conversation with him?

A. Yes, sir.

Q. Where was that?

A. Several different places.

Q. Where was the first conversation?

A. I couldn't tell you. It was there in town, I suppose.

Q. Where?

A. In town.

Q. Who was present?

A. I don't know. I never paid no attention.

Q. Now, in that conversation did you tell Champ Smith that they had offered you a job as detective or deputy-marshal*l*?

A. I might have told him I might get a job. I might have told him I might get a job or something like that, if I wanted it, or something.

Q. Well, you did have it in mind, then, to get a job as detective or deputy-marshal*l*?

183 A. Well, if there was money in it I guess I would take it. Wouldn't you?

A. No, I don't think I would; but then that is no reason why you shouldn't. You have that in mind, then, have you?

A. Oh, I have thought about it.

Q. What say?

A. I have thought about I wouldn't mind to have that kind of job, if I could get money enough out of it.

Q. How long have you been figuring on that?

A. I haven't figured at all on it. I just thought about it.

Q. Just thought about it?

A. Yes.

Q. Well, then, you say you didn't tell him that they had offered you a job as detective or deputy-marshal*l*, meaning somebody on behalf of the Government?

A. No, I think I told him I might get a job or something like that.

Q. Did you tell him that anybody had talked to you about that?

A. I don't know whether I did or not.

Q. Well, had anybody talked to you about that?

A. I don't know. Some fellow might have spoke to me about it. I believe they did. But then, they had no authority, I guess.

Q. Who was — that spoke to you about it?

A. Why, I believe it was Floyd Rowell. I ain't certain.

Q. Rowell?

A. I believe it was him.

Q. Is he somebody that is assisting the prosecution down here?

A. I don't know what he is doing. He is here as a witness.

Q When was it that he spoke to you about it?

A. I think it was when I was down here before, or after I went home. I couldn't tell you just when it was.

184 Q. The first time or the last time you were down here?

A. Just the time before this.

Q. The time before this?

A. Yes.

Q. At the other trial?

A. I think it was after we went home, or something like that; I couldn't tell you just when it was.

Q. Did anybody else speak to you about it?

A. No, sir, not that I remember of.

Q. Now, Mr. Jones, in relation to your talk with Dr. Gesner, where do you claim to have had the first talk with Dr. Gesner?

A. Prineville.

Q. Whereabouts in Prineville?

A. I couldn't tell you.

Q. When was it?

A. That was in June, 1902; sometime in June; I can't give you the exact date.

Q. Who was with you?

A. I don't know that any one but Doc.

Q. Do you remember whether there was any one else present or not?

A. I don't remember about any one.

Q. Then you don't remember when it was, or who was present, if anybody, or where it was?

A. I told you it was in June, and in Prineville, didn't I?

Q. Yes.

A. 1902.

Q. Well, you don't remember any nearer than that; that it was in June, 1902, somewhere in the town of Prineville?

A. Yes, sir.

Q. And you don't remember whether anybody was present or not?

185 A. I don't think there was, but I wouldn't be certain.

Q. You don't remember whether it was on the street, or in some office or store?

A. I wouldn't be sure. I think it was on the street but I wouldn't be positive.

Q. And how long do you claim after that that it was before you went out to the shearing plant?

A. Well, it wasn't but a few days.

Q. Who did you say went out to the shearing plant with you?

A. My wife, and Joe Calavan and his wife, and my little boy.

Q. Where does Joe Calavan reside?

A. At that time?

Q. Where does he now?

A. Some place up above here; I couldn't tell you.

Q. The Government had him subpœnaed down here at the last trial as a witness?

A. I suppose they did. He was here.

Q. Is he subpœnaed here as a witness now?

A. I couldn't tell you. He is here. I suppose he is subpœnaed.

Q. He went up there with you?

A. He went out to the shearing plant, yes, sir.

Q. Now, did I understand you that the first evening after you got up there, Calavan went out to look at the land?

A. Yes, sir. That is what he said, he went out there.

Q. But you didn't go that evening?

A. No, sir.

Q. You weren't feeling very well?

A. No, sir.

Q. The next morning you went out to look at the land?

A. Yes, sir.

186 Q. Why did you go to look at the land?

A. Well, just to see where it was at, I guess.

Q. Why did you want to see where it was at?
A. Well, I was going to file on it.
Q. And you understood that you had to swear that you had been on the land?
A. Why, yes.
Q. Was that the reason why you were going up there to look at it, because you understood at that time that you had to swear that you had been on the land?
A. Yes, sir.
Q. How far was it from Prineville up there?
A. I don't know exactly: something like 20 miles; right close to 20 miles.
Q. Did you drive your own team, or hire a team?
A. I don't know whether I drove my team or his?
Q. Calavan's?
A. Yes, sir.
Q. It was one of your teams though?
A. Yes, sir.
Q. You didn't hire a team?
A. No, sir.
Q. You took your wife up there so that she could look at the land for the same reason?
A. Yes, sir.
Q. You went up there and took your wife and went to that trouble, so that you could truthfully swear that you had looked at the land?
A. Yes, sir.
Q. How far did you go? How far did you have to go from the shearing plant to find the land in the morning?
187 A. Why, I couldn't say; something like 2 or 3 miles, I couldn't tell you exactly.
Q. Who went with you?
A. Why, Calavan and his wife went, I think, and my wife; we all went out next morning.
Q. Well, did anybody else, besides Calavan and his wife and you and your wife?
A. Why, I would be certain, Graves might have went, but I wouldn't be certain whether he did or not.
Q. Who is Graves?
A. Charlie Graves, who was surveyor up there.
Q. County surveyor?
A. Yes, sir.
Q. Was he county surveyor at that time?
A. I wouldn't say; I don't remember whether he was or not.
Q. He has been a surveyor up there in that county for a good many years, hasn't he?
A. He done quite a good deal of surveying up there, yes.
Q. Is he also subpœnaed here as a witness for the Government?
A. Well, he was; I don't know whether he is now or not.
Q. Subpœnaed down here at this trial?
A. He was.

898

Q. You mean you don't know whether he has been discharged or not?

A. I think he has.

Q. Do you think he has been discharged?

A. Yes.

Q. Did Gesner go out with you that morning?

A. No, sir, I don't think so.

Q. Who was it that showed you where the land was?

A. I think Graves went out with me. They showed it to Calavan in the evening and I wouldn't be positive if it was Graves or
188 Calavan. One of the two went out; of course I knew where the land was anyhow, as far as that was concerned, but I didn't know where the numbers was.

Q. And you went out with Calavan to see the land and find where the numbers were?

A. Well, I wouldn't say whether it was with him or Graves, one of the two of them.

Q. Calavan was along anyway?

A. Well he was at camp anyway. If he didn't go he was at camp.

Q. Oh you mean to say you are not sure whether Calavan went out there that morning or not?

A. I am not certain whether he did or not.

Q. There didn't but one of them go.

A. I think that was all, but I wouldn't be positive.

Q. Whoever went out there with you showed you the land and gave you the numbers, did they?

A. No, they showed me the land but I don't know whether I got the numbers up there or in town. Whoever went with me I don't think gave me the numbers. I think it was Dod or Biggs.

Q. You testified at both trials didn't you that we have had here both of the other trials of this case you testified didn't you you were a witness of both of the other trials?

A. Yes, sir.

Q. Testified here in court in the presence of the jury and the judge?

A. Yes, sir.

Q. Well, so testifying at the last trial didn't you testify that either Gesner or Graves gave you the numbers up there?

A. Well, I wouldn't say for certain which one it was. I couldn't say whether it was Gesner. I was thinking maybe it was Gesner or Biggs, I wouldn't be positive.

189 Q. Well, at the second trial of this case when you were testifying as a witness, you testified this way didn't you? "Q. Now what do you say as to whether or not you brought any description of this land with you to Biggs' office. A. A description of the land? I couldn't say whether I did or not. I don't think so. I just told him the numbers; they gave me the numbers."

Did you so testify?

A. I don't remember. I know some of them gave me the numbers and I couldn't say which one.

Q. Well did you also testify in that examination—of course, if you want to see this I will show it to you at any time you want to see it.

A. Yes, I understand.

Q. Did you, at that examination, testify in answer to the questions that were asked you, as follows? I will give you all the questions right along here, and the answers; "Well, you either told him the numbers or brought the description with you, did you? A. Well, they gave me the numbers. Q. Who gave you the numbers—Gesner or Graves? A. Gesner or Graves, one of the two. Q. And you either told Biggs those numbers or brought them with you? A. Well, I couldn't say; it must have been something like that."

Did you so testify?

A. It was something that way, I couldn't tell you exactly.

Q. Well, did you testify that it was either Gesner or Graves who gave you the numbers?

A. Well, I couldn't tell you. It was some of them; I couldn't tell you just which one it was.

Q. Your memory was a little fresher, wasn't it, at the last trial?

A. I don't know that it was.

Q. A little bit longer has elapsed since the last trial?

190 A. I don't know anything about it. I guess it is all right now.

Q. You don't remember whether you testified that way or not, then?

A. Why, some of them gave me numbers; I told you before.

Q. But you don't remember whether you testified it was either Gesner or Graves gave you the numbers?

A. It was either of them three that gave me the numbers, and I couldn't tell you.

Q. I am asking you whether you testified at the other trial whether it was one of those two, either Gesner or Graves.

A. Well, I guess you have got it there, haven't you?

Q. Well, I am asking you?

A. Well, it was some one of them, and I couldn't tell you which one.

COURT: He is asking you as to what you testified to; not what the fact was, but as to what the testimony was; and he has a right to an answer to his question. Just answer his question.

Q. Did you testify at the other trial that it was either Gesner or Graves?

A. I think I did.

Q. Leaving Biggs out. Now, when you had that conversation with Dr. Gesner about the matter of filing, that you speak about, did he tell you that he was having trouble with the cattle men up in that vicinity?

A. Yes, sir.

Q. That was the first conversation you had with him?

A. I don't remember whether it was or not.

Q. Well, it was the conversation that you have testified about, down there in Prineville, before you went up, was it?

A. Why, he told me about that two or three times.

Q. Well, in the conversation that you have testified about,
191 when you claim that he asked you to go up there and take a timber claim, did he in that conversation?

A. Well, I knew it, yes, sir.

Q. Tell you that he was having trouble with the cattle men up there?

A. Yes, sir.

Q. He did tell you that, did he, in that conversation?

A. Yes, sir.

Q. And he told you at the same time, didn't he, that he was very anxious to get the grass for that season?

A. Yes, sir.

Q. And he told you didn't he, in the same conversation, that he would loan you the money and let the grazing privilege stand off the interest?

A. He told me he would furnish the money.

Q. Well, didn't he tell you that he would loan you the money and let the grazing privilege stand off the interest; as long as you let him have the use of the land?

A. He said he would furnish me the money; that is just what he said to me.

Q. Well, how about the balance of it—if you want to put that word furnish in there—if you are so particular about that.

Mr. HENEY: You interrupted the witness; he was trying to tell you.

Q. Did he tell you that he would let the grazing privilege stand off the interest as long as you let him have the use of the land?

A. Yes, sir.

Q. He did: in that conversation?

A. Yes.

Q. You remember of that very plainly, do you?

A. Yes, sir.

Q. Then, you understood that the furnishing of this money
192 was to be a loan, and that you were to give the grazing privilege for the interest?

A. He said he would furnish me the money, just as I told you.

Q. So, it don't make any difference whether you were to give a note or a mortgage or not, you understood it was to be a loan?

A. No, he didn't say no loan. He says, "I will furnish you the money."

Q. Well, it don't make any difference what he said; you understood that it was to be a loan and that you were to give him the grazing privilege for the interest?

A. Well, I am going to look my way. I am telling you just what was said exactly, and if you want to change it, you can change it.

Q. I can't understand you; you speak so low.

A. I am telling you just exactly what was said, and if you want to change it, you can change it; I ain't going to.

Q. No, I don't want it any other way. I want to know whether you understood it was a loan. I am not asking you what was said, but what your understanding was, if you understood it was a loan or not?

A. He told me just like this; he would furnish me the money, just as I told you, and would charge me no interest; he would take the grass for the interest on the money.

Q. Then, didn't you understand it to be a loan, if he was to take the grass for the interest on the money.

A. I am telling you what he said.

Q. I am asking you what you understood?

A. Well, I have told you just exactly the words that was said.

Q. What say?

A. I have told you just what was said.

Q. You refuse to tell me what was your understanding in
193 relation to that matter, do you?

A. Refuse to? I have told you, haven't I?

Q. No. I am asking you, not what was said, but what was your understanding in relation to the matter?

A. Well, I understood that he was to furnish me the money.

Q. Well, did you understand that it was to be a loan or a gift?

A. Well, you can fix it; I am telling you exactly what was said.

Q. What did you understand about it.

A. That he was to furnish the money.

Q. Well, did you understand that he was to furnish it as a loan or a gift?

A. He was to furnish it to me; I was to pay him back.

Q. What say?

A. I was to pay him back when I sold the land. He was to buy the land.

Q. You were to pay him back when you sold the land?

A. He was to buy the land from me.

Q. Now I understood you to say in your testimony that you claimed that Biggs told you when you came to file on the land that Gesner would furnish you the money?

A. Yes, sir.

Q. Well, now, isn't it right the other way; didn't you tell him that Gesner would furnish the money and for him to go and get it from Gesner, or that Gesner would loan you the money and for him to go and get it from Gesner?

A. The one that I asked you a moment ago?

A. Yes.

Q. Well, I asked you if I understood you right—I understood you to testify that Biggs told you, when you went to file on the land, or at some time before you made final proof, that Biggs told you
194 that Gesner would furnish the money. Did you testify to that or did I understand you?

A. Gesner told me he would furnish the money.

Q. Did Biggs tell you that Gesner would furnish you the money or did you tell Biggs that?

A. I couldn't tell you; I must have told him.

Q. What say?

A. I couldn't tell you; I must have told him that Gesner would.

Q. You must have told Biggs? You don't claim then, that Biggs told you that Gesner would let you have the money?

A. At the time that you went there?

A. I couldn't say.

Q. You don't remember of his telling you anything of that kind?

A. No; he might have told me.

Q. I say do you claim to remember of his telling you anything of that kind?

A. Well, at the other trial—and I am referring now to the last trial—you testified, in answer to the question, "What did Biggs say to you about it?"—that is, referring to a previous answer that was just made, in which you said Gesner said he would furnish the money, and the question immediately following, "What did Biggs say to you about it?" did you answer, "I don't remember now whether he said anything or not?"

A. Well, I couldn't.

Q. What say?

A. I don't remember. He might have but I don't remember.

Q. You don't remember whether he said anything about it at all or not?

A. No. He might have said something, but I don't remember.

Q. Do you remember whether you had any talk with Biggs about it or not?

A. Yes. There must have been something said about it,
195 but I couldn't remember just what it was.

Q. You couldn't remember just what it was, but you think there must have been something said about it? You have referred to the fact that you didn't give a note?

A. Yes, sir.

Q. Isn't it a fact that you were to give a note and mortgage when you got your final receipt?

A. No, sir.

Q. You had other money transactions with Gesner at the time didn't you?

A. Yes, sir.

Q. He was owing you quite a large sum of money, wasn't he?

A. No, sir. Not a large sum of money.

Q. Not a large sum of money?

A. No, sir. I and him and Wurzweiler had some money there in the bank; we had some along just after that a little while. Not a great while after.

Q. You mean by that that you had some of it, or that they owed you some?

A. Well, the money was just in this way. I had sold the horses, the company horses, and the money was in their name.

Q. And they had the money, but part of it was coming to you?

A. Yes. Well, it was not all paid in, of course. It was coming to the company, don't you see?

Q. What say?

A. It wasn't all paid in at that time.

Q. How much of it was paid in at that time?

A. Well, I couldn't tell you how much was paid in.

Q. Well, about how much.

A. At the time I made final proof?

Q. Yes, say at the time you made final proof?

196 A. Why, there was something like two or three thousand dollars, but we owed it on the horse-, I think, at the time.

Q. What say?

A. There was something like two or three thousand dollars. I couldn't say, but we owed it on the horses we bought. We hadn't paid up on the horses yet.

Q. That is, they were to pay for the horses, then part of the balance would be coming to you?

A. Yes, sir.

Q. How much did you owe on the horses at that time?

A. Well, I couldn't tell you, just at that time, what we did owe.

Q. Well, about how much?

A. Well, I couldn't say. Wurzweiler kept the books.

Q. Well, there was a good large sum of money coming to you from them, wasn't there at that time? Seven or eight or nine hundred dollars?

A. Yes, I guess there would be that much.

Q. You don't consider that a very large sum?

A. Not if you owe more than that, it ain't very much.

Q. Now, at the first trial of this case, in relation to the matter of borrowing the money, this question was asked you, wasn't it? "So that you were really borrowing the money to pay for it, weren't you?" (Referring to this land and the transaction with Gesner) and didn't you say "Yes, I must have been" on first trial?

A. Borrowed or furnished it, I don't know which now.

Q. What say?

A. I don't just remember how I answered that question, but I know what he said.

Q. But, at the first trial, in answer to the question—"You understood that that was a loan—you understood that you were

197 borrowing it, didn't you?" didn't you answer "Yes, sir"?

A. Didn't I tell you?

Q. Mr. HENEY: I don't see how that is competent. He has already testified the same way in this case. Now do you want to reinforce it by showing that he testified the same way last time? I will admit it.

Mr. BENNETT: Well, that is all right if you will admit it.

Mr. HENEY: I will admit that he testified to that the first time, and I will admit that he made a prior statement the same.

Q. Were there a good many people locating timber land out in that country about that time?

A. Yes, sir. There was quite a good many out there looking at the timber.

Q. What say?

A. There was quite a good many of them up there. I couldn't say just how many.

Q. Coming in from the outside?

A. Up there?

Q. Yes. Coming into that country, I say.

A. Oh, into different parts of the country.

Q. But into that Prineville country. The general country there?

A. Yes.

Q. A great many people weren't there?

A. Quite a good many, yes.

Q. Coming in by carloads, weren't they?

A. The cars don't run in there. They came in by stageloads, tho'.

Q. Came in by stageloads, eh?

A. Yes, sir.

Q. The cars don't run there. And there were people engaged in the business of locating other people on timber lands through the country there?

198 A. Yes, sir. I think there was. I have heard them say there was.

Q. What say?

A. I have heard them say there was quite a good many.

Q. Well, don't you know there was some there doing that business?

A. Well, heard them say there was; that they was locating people. That is all I know. I never saw them locate any one.

Q. You know by general reputation they were engaged in that business there?

A. Yes, they told me themselves they was.

Q. A good many different people?

A. Several of them, yes.

Q. Engaged in selecting locations for claimants?

A. Yes, sir.

Q. Pointing out the lands and so on. Didn't Dr. Gesner tell you at this first conversation that he had with you, that you have testified about, that he could not make a contract to buy the land and you could not make a contract to sell it?

A. At that time?

Q. Yes.

A. I don't think so.

Q. What say?

A. No, sir; I don't think so.

Q. You remember whether he did or not?

A. I know he didn't.

Q. Well, now, in the first trial of this case weren't you asked these questions: "Didn't he tell you there that you could not make a contract for the sale of it, and he could not make a contract to buy it?" And didn't you answer "I don't remember now"?

A. I don't remember how I answered that. I know how the con-

tract was made. We didn't have no written contract. It was
199 a verbal contract.

Q. I am not asking you how the contract was made, Mr. Jones.

A. All right.

Q. I am asking you whether you testified at the other trial in answer to the question, "Didn't he tell you there that you could not make a contract for the sale of it, and he could not make a contract to buy it?", didn't you answer, "I don't remember now."

A. Well, if he did, I don't remember that.

Q. Then wasn't this question asked you immediately after, "Will you swear that he never told you you could not make a contract to sell the land, and he could not make a contract to but it?" and did you answer, "I couldn't swear that he told me that." Then the question being asked you "Would you swear that he did not tell you that?" did you answer, "Why, he might have told me that; I don't know?"

A. I don't remember about that conversation between I and him.

Q. Well, I am asking you if you so testified at the first trial of this case?

A. No, sir; I don't think I did. I don't remember, but I don't think so.

Q. Well, if you did so testify, it wasn't true, was it?

A. How is that?

Mr. BENNETT: I will withdraw that question.

Q. Now, after you went up there to the shearing plant and after you had made your sworn statement, applied to purchase this land, you told a great many people up there in that country, did you not, that you hadn't made any contract for the sale of it?

A. No, sir, I don't think I did.

Q. Didn't you claim for many months after that that you hadn't made any contract?

A. Why would I, when I went and told my wife what we would do?

200 Q. Well, I am asking what you claimed to other people.

A. I don't think I said anything of the kind.

Q. Didn't you prior to the first trial of this case, tell a great many different people, just a few weeks prior to the first trial of this case, tell a great many different people, that you hadn't made any contract or agreement to sell your land, timber land, that you were buying?

A. No, sir; I did not.

Q. Didn't you come into Dr. Gesner's office about six weeks before the first trial, and there, yourself, voluntarily tell him that you never made any contract with him about the land?

A. No, sir.

Q. He and you alone being present?

A. No, sir; I didn't.

Q. Oh, I got that wrong. I will change that question. Didn't you go into Dr. Gesner's office about six weeks before the first trial

and there, yourself, voluntarily tell Mr. Williamson, you and Mr. Williamson being alone present, that you never made any contract with Dr. Gesner about this land?

A. No, sir; I did not.

Q. Didn't you about six months after you had made this application for the land, and when you made your final proof, didn't you swear in that final proof that you never made any contract to sell the land?

A. Yes, sir.

Mr. HENEY: That is objected to because the proof answers for itself.

Mr. BENNETT: Well, I have a right to refer to the matter.

Mr. HENEY: Oh, yes; go ahead.

201 Q. You deny that you made these statements to different persons, but you admit that you swore to it on the stand or swore to it when you were making your final proof?

A. I deny what?

Q. That you made statements to different parties that you had no contract, you deny that: but you admit that you swore that you had no contract?

A. Yes, sir.

Q. And you had your wife swear to it, did you?

A. Yes, sir.

Q. Well, now, you claim that you swore to a lie—a whole lot of lies, in fact—for $75 apiece?

A. Yes, sir; I've got to admit it, I done it, didn't I?

Q. That is what you say you did.

A. I did do it, too.

Q. I believe you explained that at the last trial by saying you were short of money?

A. Yes, sir.

Q. Well, you had then eight hundred or $900 coming to you, didn't you?

A. It was in shape so it wasn't paid in yet. I wanted some money.

Q. Wanted the ready money?

A. Yes; I wanted some money. Don't you think it comes pretty handy once in a while?

Q. How are you fixed for ready money now?

A. Pretty short.

Q. Pretty short, now, are you?

A. Yes, sir.

Q. Do you think you could make more than $75 out of a job if you had it as detective or deputy-marshall?

A. Just owing to how much I was getting, what work I would do.

202 Q. What has been your occupation for the last two years?

A. I have been working in a saloon most of the time.

Q. Working in a saloon?

A. Yes.

Q. Bartender?

A. Yes and buying up some stock for other people.
Q. How much of the time have you been working in a saloon?
A. Oh, I couldn't tell you just how much of the time.
Q. Well, about how much in a general way?
A. I generally worked the winter months—did last winter and the winter before.

Redirect examination:

Q. Mr. Jones, you were subpœnaed as a witness, before the Grand Jury, in February, 1905, were you not?
A. Yes, sir.
Q. Up to that time how many times had you ever seen Mr. Neuhausen?
A. Before I come down in February?
Q. Yes.
A. Oh, I might have seen him half a dozen times. I couldn't say just exactly.
Q. Where?
A. In Prineville.
Q. How many times did you talk with him there?
A. I believe twice or three times,—something like that.
Q. Now then, at the time that you were here in February, 1905, did you testify before the Grand Jury?
A. No, sir.
Q. Did you make a statement at that time?
A. Yes, sir.
Q. To whom did you make it?
A. Mr. Neuhausen.
Q. And did you sign it.
A. Yes, sir.
203 Q. Is that it—is that your signature there?
A. Yes.
Q. That's it, is it?
A. Yes; that's it.
Q. Had you been promised any job as a deputy-marshal at that time?
A. No, sir.
Q. Had anybody tried to influence you in any way as to how you should testify for the Government?

Objected to.
Objection overruled.
Defendants except.

A. Yes, sir.
Q. Who?
A. Why, you—you told me to come up here and tell the truth.
Q. Before you made that statement?
A. No. Neuhausen told me before I made that statement.
Q. Had anybody made any threats to you at that time that you made that statement?

Mr. BENNETT: We object to that, your Honor. The witness never has been asked as to whether anybody made any threats to him.

Objection overruled.

Defendants except.

Q. At the time that you made that statement which you signed before Neuhausen, which is in the hands of counsel for the defense, had any promises been made to you by any person on behalf of the Government, to influence you in what statement you should make?

A. No.

Same objection, as incompetent, immaterial, and an attempt to back up the witness in a way he is not attacked at all.

Objection overruled.

204 Q. What is the answer?

A. No; there had been no threats made to me.

Q. Do you remember when it was you were subpœnaed here for the first trial of this case?

A. Before the Grand Jury, you mean?

Q. No; for the trial.

A. No; I couldn't just tell you.

Q. Well, the trial started about July 8th. When did you come here in answer to that? You were subpœnaed here for that trial were you not?

A. I think I got in the 7th, wasn't it? I think I got in the night before the trial started.

Q. Now, you were here during that whole trial?

A. Yes, sir.

Q. And during that trial you with the other witnesses were required to remain in attendance on the Court upon the next floor at the District Attorney's office—my office——

A. Yes, sir.

Q. Were you not?

A. Yes, sir.

Q. And sit there in the hall waiting to be called in my office, which is a large room, in which Mr. Neuhausen and Mr. Rittenhouse and Mr. Burns and four or five others are in and out and in here most of the time? Is that correct?

A. Yes, sir.

Mr. BENNETT: I want to submit, your Honor, the question as to whether counsel has a right to put his questions in this leading form. We object to it as leading.

Mr. HENEY: All right, then, I won't lead him.

Q. Now, then, the only talks you ever had with Mr. Neu-
205 hausen were in that office, were they not?

Mr. BENNETT: Objected to as leading.

Q. Where did you have your talks with Mr. Neuhausen that you have referred to?

A. Around different places—in the court-room here, or, in the courthouse, and in the office.

Q. As you happened to meet him up there in that hall and in the room?

A. Yes, sir.

Q. And the other witnesses were present there, some twenty or thirty or forty of them?

A. Yes, sir.

Q. And were you ever in the room alone with him?

A. I don't think I was. I don't remember of being in there alone with him.

Q. Were you ever paid anything or offered any pay to act for the Government in securing testimony?

A. No, sir, never was.

Q. Now, at the second trial, the witnesses remained in attendance in the same way, did they?

A. Yes, sir.

Q. That was during the day?

A. Yes.

Q. Who is Champ Smith? Is he any relation to C. Sam Smith?

A. He is a brother to him.

Q. Did Gesner ever say anything to you about holding out any part of the money that might be coming to you as a stand-off for the money furnished on his final proof?

A. No, sir.

Q. No talk about that whatever?

A. No, sir.

206 Q. Have you collected money that was coming to you?

A. Why, not all of it I don't think. We haven't settled up yet. I don't know just what there is there.

Q. And these checks from the Land Office you returned to him as soon as they arrived, did you?

A. Yes, sir,—that is, within a day or two.

Q. No misunderstanding between you and Gesner about money matters is there?

A. I don't think so. I don't know of any.

Q. Hasn't been any?

A. No.

Recross:

Q. Since you turned over the checks, you have drawn considerable money, haven't you?

A. Oh I have drawn out some money. I don't know just how much.

Q. About how much?

A. Oh I guess about $200 or $300—something like that.

Q. There is still considerable coming to you?

A. Why there is some. Yes, I guess.

Q. Now, do you mean to say that in these talks you had with Neuhausen and Burns and these people that there were always thirty or forty other witnesses present?

A. No; not always.

Q. Was there always any other witnesses present?

A. I don't think I ever talked with one of them but what there was some one around.

Q. Well, some of the witnesses or other government employés?

A. Why in the court room.

Q. Do you mean to say that your talks have been here in the court room?

207 Mr. HENEY: Court-room, you say, room or house?

A. Well in the house there or in the office some place.

Q. Have you talked with them at other places?

A. I don't think I have. I don't remember talking with them any place else.

Q. Has there always been some of these witnesses present do you say, when you were talking to them?

A. I might have been in the office there and there wasn't any other witnesses in there at all.

Q. A good many times, haven't you?

A. No; I don't think a good many times.

Q. A good many times you have gone in and whispered to them when the other witnesses were there haven't you?

A. No, I don't think so.

Q. You claim you never have?

A. I might have whispered to them. I don't know.

The COURT: If I remember, you asked this witness a question—just at the time my attention was diverted, I was trying to read that book—whether he knew some one, a government detective. I think Mr. Heney objected and I held that objection as well taken. I think you can ask that question. That is simply a characterization of the employment of the man. If you desire to ask it——

Mr. BENNETT: Well, I think it is pretty well developed from the examination of the witness that he doesn't know, but I will ask the question however.

Q. Do you know Snelling, a Government detective?

A. No, sir.

Witness excused.

Adjourned until to-morrow morning at 9:30 a. m.

208 And thereafter one GREEN BEARD being upon the stand and having testified in substance that defendant Biggs first suggested to him to go up and take a timber claim and to get his folks to go up and take a timber claim, and that he had gone up and made an arrangement with Gesner about taking the claim, and that he got the numbers and come down to the defendant, Biggs, to file, and having been asked the question, "At the time you appeared before him to file did you sign these two papers (showing witness sworn statement or applications) the witness answered, "They look very much like the papers I signed." Whereupon the two papers being a duplicate of each other were offered in evidence by the Government, the papers read as follows:

"I, Green Beard, of Prineville, County of Crook, State of Oregon, desiring to avail myself of the provisions of the Act of Congress of

June 3rd, 1878, entitled "An Act for the sale of timber in the States of California, Oregon, Nevada and Washington Territory, as extended to all the public land states by Act of August 4, 1892, for the purchase of the S. 2 of N.E. 4 and S. 2 of N.W. 4 of Section 14, Township 15, S. of Range 18 E. W. M., in the district of lands subject at The Dalles, Oregon, do solemnly swear that I am a native citizen of the United States, of the age of 34, and by occupation, farmer; that I have personally examined said land and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposits of gold, silver, cinnabar, copper or coal; that the land contains no salt springs or deposit of salt in any form, sufficient to render it valuable therefor; that I have made no other application under said Act; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit; and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any
209 person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure, in whole or in part to the benefit of any person except myself, and that my post office address is Prineville, Oregon.

"GREEN BEARD, *Applicant.*

STATE OF OREGON, *County of Crook*, ss:

I, M. R. Biggs, do hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto, that said affiant is to me personally known (or has been satisfactorily identified before me by ——) and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this 30th day of June, 1902.

"M. R. BIGGS,
"*U. S. Commissioner.*"

And thereupon the defendants objected to each of said papers upon the ground that the indictment does not state any indictable offense, and upon the further ground that each of said papers varies from the indictment; That it is not any deposition or declaration such as is mentioned in the indictment; That it is not such a paper as can be made the basis of an indictment for perjury and is variant from the indictment. Whereupon the objection was overruled by the court and the defendants excepted to the ruling upon each paper and their exceptions were allowed. And thereafter like applications of each and all of the other applicants hereinbefore designated, except the applicant Jones, was offered and received and put in evidence subject to the same objections and exceptions on behalf of the defendants, and it was stipulated and agreed that such objections should apply to each of these sworn statements. And thereafter the said witness, Green Beard, was asked the following questions, "At

the time you signed these papers what was your intention as
210 to what you would do with the land when you obtained title to it?" And thereupon the defendants objected to said question upon the ground that the same was incompetent and immaterial, and because the secret intention of the parties was not binding upon the defendants, and this objection was made as to each of the defendants and was overruled by the court, and the witness permitted to answer, "Why the land was to go—the land was to be turned over to Williamson and Gesner." To which ruling the defendants each then and there excepted and their exception was allowed.

The following is all the testimony of the aforesaid witness Green Beard, introduced at the trial.

211 SEPTEMBER 9, 1905—9.30 a. m.

The court met pursuant to the adjournment and the trial was resumed.

GREEN BEARD sworn on part of the Government testified as follows:

Direct examination.

By Mr. HENEY:

Q. Where do you reside?
A. I live about 8 miles from Prineville.
Q. How long have you lived there?
A. About sixteen years.
Q. Do you know these defendants, Williamson, Gesner and Biggs?
A. Yes, sir.
Q. How long have you known Williamson?
A. Oh, I have known Williamson for probably 10 years.
Q. Your relations friendly with him or otherwise during that time?
A. Yes, sir, we have always been friendly so far as I know.
Q. How long have you known Gesner?
A. Probably about the same length of time.
Q. Have your relations with him been friendly or otherwise during that time?
A. Nothing only friendly relations.
Q. How long have you known Biggs?
A. I think about five or six years.
Q. Have your relations with him been friendly or otherwise during that time?
A. Friendly, is all I have ever had with him.
Q. Did you make a filing on a timber claim in 1902?
A. Yes, sir.
Q. Who first suggested to you that you should make one, if anyone, or talked with you about it?
212 A. Mr. Biggs.
Q. What did he say to you and when and where was it?

A. It was in Prineville.

Q. Could you say where in Prineville?

A. I aint certain but what he was at his office; I would not be positive though.

Q. About when was it?

A. I think it was in the fore part of June some time in 1902.

Q. I will have to remind you again that I have heard this story a dozen times and the jury hasn't heard it at all yet, and all this testimony is for their benefit and not mine; so you must speak to them.

A. In 1902 I had a talk with Mr. Biggs about the first of June.

Q. What did he say?

A. He wanted to know if I didn't want to take up a timber claim for Dr. Gesner.

Q. Tell the whole conversation.

A. I told him I might take up a timber claim for him; and he said for me to study the matter over, and see the folks up there and see if the balance of them would not go and take some timber claims, my wife and boys. And he said if we wanted to take up a timber claim, to come up a certain day and Mr. Gesner would be there to show us where to take those claims.

Q. What, if anything, did he say about the terms on which you were to take it?

A. Well, he said they would give $500 a claim for them.

Q. What was said about furnishing the money?

A. He said Mr. Gesner would furnish the money to prove up on the claim.

Q. What did you do after that?

213 A. We went up there and took it up.

Q. How soon after that talk? Did you go up on the day he said?

A. No, sir, but it was but a few days after that we went up there. It couldn't have been much over a week if it was that long, I don't think.

Q. Did you have any further talk with him, Biggs, before you started up?

A. I don't think we did have any further talk.

Q. He went up with you when you went up there?

A. Well, there was my wife and one of the boys, Frank Ray and his wife; that is all that went up from where I lived.

Q. One of the boys; do you mean one of your sons?

A. Yes.

Q. Which one?

A. Frank.

Q. Did you repeat to them before starting what Gesner had said to you about the terms?

Objected to as leading.

Q. Did you say anything to them before starting as to what the terms were to be and as to who told you?

A. Yes, sir.

Q. What did you tell them?
A. I just told them what they said about it.
Q. What who said?
A. What Biggs had told me about what they would give for those claims.
Q. Did you tell them who told you?
A. Yes, sir.
Q. You all started up there together, did you?
A. Yes, sir.
214 Q. When you went up there, where did you go to?
A. We went up to what they call Sheep Camp on Horse Heaven.
Q. Is that the place known formerly as the Cable ranch?
A. Yes, sir.
Q. Now known as the sheep shearing plant?
A. Yes, sir.
Q. Whose sheep shearing plant is it known as?
A. Williamson and Gesner's.
Q. Generally known by that name?
A. Yes, sir.
Q. When you got there whom did you find?
A. When we first went there, there was nobody there that I noticed, only one of the Wakefields, Ernest Wakefield.
Q. Was he a partner at that time of Williamson and Gesner in the sheep business?
A. I think he was. Then, shortly after that Mr. Gesner and Graves came.
Q. What Graves is that.
A. Charlie Graves.
Q. The surveyor?
A. Yes, sir.
Q. What was said?
—. He just told them where they would find the claims and what pieces he wanted them to file on.
Q. Were there any other persons there besides you and your family?
A. Yes, sir.
Q. Whom else?
A. Cam Duncan and his wife.
Q. Whom else?
A. There was Frank Ray and his wife, and Cam Duncan
215 and his wife and there was a man that I didn't know there.
Q. Did you hear Gesner make any talk there as to what terms he wanted the land taken up on?
A. I think he made a little talk, yes.
Q. Who was present when he made that talk?
A. Well, this man I didn't know was present, and myself and Cam Duncan and Frank Ray.
Q. What did Gesner say? Give all you can remember of what he said; the substance of it to your best recollection.
A. He said that—I can hardly recollect now what he did say.

He was talking some to me about something about money matters, to them I think, in regard to their claims.

Q. What did he say about it?

A. Well, I think he said they would have to give him a mortgage on these claims to secure him, or something like that.

Q. For how long a time?

A. Oh, a short time I suppose.

Q. Never mind, what you suppose now; I want to know what he said if anything?

A. Well, that was about all he said, that they would have to give him a mortgage on his land to secure him a certain length of time.

Q. Did he say how long or until what event?

A. I don't think he did.

(By JUROR:)

Q. How long?

A. I say I don't think he said anything about the length of time.

Q. Didn't he say it was until you got title?

Objected to as leading.

The COURT: What the district attorney and jury want to
216 hear, witness, is the whole conversation. Without suggesting words to you, you ought to exert your mind and go ahead and tell these gentlemen the whole conversation.

A. Well, he wanted these mortgages until they got their title; he wanted a mortgage until they got their titles secured and then they were to turn them over to him.

(By JUROR:)

Q. You said turn them over; you mean the claims, do you?

A. Yes, sir.

Q. Did he say anything about the price that was to be paid when they were turned over?

A. Yes, sir; he was to furnish money enough to prove up on these claims, and after they was turned over to them he was to pay the balance, was my understanding.

Q. Balance of what?

A. Balance of the $500.

Q. Who if anybody, told you which piece of land to file on while you were up there?

A. Who give us the numbers or showed us?

Q. Yes, or showed you or told you what to look at, or what was said if anything about that?

A. Mr. Gesner showed us where we could find the land; showed us where to go to look at it.

Q. Did he tell you which particular piece you were to look at?

A. Yes, sir.

Q. Did he do that as to others?

A. I think he did.

Q. Then who gave you the description, the numbers, as you call it?

A. I think Mr. Graves did.

Q. What did you do after that?

217 A. Well, me and my wife——

Q. You had not employed Graves, had you?

A. No, sir.

Q. You didn't pay Graves any money?

A. No, sir.

Q. You didn't agree to?

A. No, sir.

Q. He did not ask you for any?

A. No.

Mr. BENNETT: This is all very leading, your Honor.

Mr. HENEY: We can be two weeks trying this case, or we can get through in one. I am not going to lead on anything that is going to be injurious to the defendants. That is clearly not, because it is a matter they admit to be so.

Mr. BENNETT: It is better to try this case in two weeks and try it according to the rules of law, justly and fairly, so that the defendants may have their rights and a fair show, than to try it in one week and deprive them of those rights.

The COURT: I shall hold, Judge Bennett, that it is not necessary to lead this witness; the witness is intelligent. Witness, speak up: you must remember that the jury are the gentlemen who are to pass upon the evidence.

Q. Did you have any arrangements with Graves of any kind or nature in regard to whether he was to be paid for furnishing you those numbers?

A. No, sir.

Q. Do you know what he was doing there?

A. He was surveying.

Q. Do you know for whom?

A. I think he was surveying for Mr. Gesner.

Q. After you got those numbers what did you do?

218 A. Went down and filed on them.

Q. Where?

A. At Prineville.

Q. When did you file with reference to the time you were up in the timber?

A. I think it was about the next day, probably, that we filed on them.

Q. Who went with you when you went to file?

A. Just me and my wife.

Q. Before whom did you go to file?

A. Mr. Biggs.

Q. That is the defendant here, Marion R. Biggs?

A. Yes, sir.

Q. Where was it that you went before him?

A. In his office.

Q. Where was that?

A. Prineville.

Q. Is that your signature on each of those papers?
A. Yes, sir.
Q. At the time you appeared before him to file, did you sign these two papers?
A. They look very much like the papers I signed.

Mr. HENEY: We will offer these two papers in evidence.
Mr. BENNETT: For the purpose of making the record complete, we want to make the objection we made on yesterday a little more elaborate. We object to each of these papers upon the ground that the indictment does not state any indictable offense; upon further ground that each of these papers varies from the indictment; that it is not any deposition or declaration such as is mentioned in
219 the indictment; that it is not such a paper as can be made the basis of an indictment for perjury, and is variant from the indictment. I would like to have this objection go to each of these different papers without interposing it each time.
The COURT: Have you any objection to that, Mr. Heney?
Mr. HENEY: None, whatever.
The COURT: It may be considered as applying to all papers of like tenor to those now introduced.
Mr. BENNETT This is the sworn statement.
The COURT: And the objections are overruled and the defendants allowed an exception.

Q. At the time you signed and swore to this paper, did you leave those two papers with Mr. Biggs? You left them there, didn't you? Did you carry them away with you?
A. Well, I took some papers down to the printing office myself.
Q. To the printing office?
A. Yes.
Q. You did not take these papers to the printing office?
A. I don't think so.
Q. Did you send these papers to the Land Office at The Dalles, yourself?
A. Why, I paid my own filing fees and gave the papers to that man, and I suppose he sent them off.
Q. To what man?
A. The man that published them.
Q. You did not give these papers to the man that published the notice?
A. They don't look like them, no.
Q. To whom did you pay the filing fees?
A. I paid them to Fogle, I think.
220 Q. The *filing* fee. Fogel published the newspaper, didn't he?
A. Oh! I paid them to Mr. Biggs.
Q. Well, did you ever send these two papers to the Land Office at The Dalles, yourself?
A. No, I don't think so.
Q. At the time you signed these papers what was your intention

as to what you would do with the land when you obtained title to it?

Mr. BENNETT: We make the same objection to this question as we made to this class of testimony before.

Objection overruled. Defendants except.

A. Why, the land was to go to—the land was to be turned over to Williamson and Gesner.

Q. For what consideration?

A. $500.

The papers just introduced in evidence were marked Government's Exhibits 9 and 10.

Q. Did your wife sign a couple of papers at the same time you were there before Biggs?

A. Yes, sir.

Q. Is that her signature on each of those two papers?

A. I think that is her signature all right; it looks like it.

Mr. HENEY: We will offer these two papers in evidence.

Same objection. Same ruling. Same exception.

The same were marked Government's Exhibits 11 and 12.

Q. Before filing that paper, what, if anything, did your wife say to you as to what she intended to do with the land when she secured the title?

Mr. BENNETT: That is objected to as immaterial, incompetent, hearsay, and not binding in any way upon these defendants.

The COURT: If he acted as the agent, it is within the scope
221 of the agency. Did he testify that the defendant told him to see his wife?

Mr. HENEY: Yes, sir.

Objection overruled. Defendants except.

A. She claimed to let Mr. Gesner and Williamson have it.

A JUROR: May I ask a question, to make a point perfectly clear?

Mr. HENEY: Yes.

The JUROR: I should like to know if at the time of the entry of this land it was expressly understood that when this mortgage was given to Dr. Gesner by the one who entered the land, that the land was to be turned over to Gesner or if he had the privilege of selling it to anyone else and redeeming the mortgage, if he desired?

Q. What was your understanding in regard to that?

A. Well, there was nothing said about turning it over to any other party.

Q. Then you took it up with the full understanding in regard to that?

A. Well, there was nothing said about turning it over to any other party.

Q. Then you took it up with the full understanding that you were to turn it over to Dr. Gesner for the $500?
A. Yes sir.

Objected to as leading.

The COURT: Yes, that is leading. It is, however, slow work to get along with this witness.
Mr. BENNETT: He has stated fully in relation to that in his own language.
The COURT: I will sustain your objection to that question. He has answered the question propounded by the juror.

222 Q. Did you make final proof upon this land?
A. No, sir.
Q. Why didn't you?
A. Well, Mr. Gesner did not want the women to prove up, and I did not think I would.
Q. What did he say to you about it?
A. Well, he said he didn't think it would be best for so many of us to prove up in one family.
Q. Did he say why?
A. Well, I don't know as he did say why.
Q. You were having some talk with him about some reason for it, weren't you, at that time?
A. Well, not a great deal of talk. I don't think he felt altogether right about it.

Mr. BENNETT: We ask that that be stricken out as being a conclusion of the witness.
The COURT: I did not quite understand the answer, whether he meant to say that Dr. Gesner said he did not feel right about it, or that he thought so.

(By the COURT:)

Q. What did you mean by that?
A. I meant that I did not think that Dr. Gesner felt safe about it.
The COURT: Well, not what you thought; give us what he said.

(Mr. HENEY resuming:)

Q. What did the Doctor say? Did he say anything along those lines?
A. Well, he did not say very much about it.
Q. Did he say anything about any newspaper publication?
A. Well, he never said anything about it to me.
Q. Did he say anything about trouble with the Government?
223 A. He said they might have a little trouble about it.
Q. Is that all you can remember of what he said?
A. That is about all he said to me.
Q. What did you say to him about that, if anything?
A. He wanted me to go ahead and prove up, and I told him I did not believe I wanted to.

A JUROR: We can't hear.

A. He wanted me to go ahead and prove up, and I told him I didn't believe I wanted to.

Q. Did you mean you alone or the family, to prove up?

A. Well, he would not consent for any of us to prove up, only me.

Q. He wanted you alone to prove up?

A. Yes, sir.

Q. What did you say to him in reply to that?

A. I told him I did not believe I wanted to prove up either.

Q. Did you tell him why?

A. I told him I didn't think it was right.

Q. Now, after making that talk, did you finally relinquish?

A. Yes, sir.

Q. How long after the talk with Gesner?

A. I could not say to the date all right; it was not very long though afterwards.

Q. Was it a day or two, or week or two, or month or two?

A. I couldn't say; I don't remember how long it was, anything about it.

Q. Was it anywhere near the time that had been set for taking final proof?

A. It must have been pretty close to it.

224 Q. When was that conversation with reference to the time of taking final proof—your talk with Gesner about proving up?

A. I don't think it had been much over a week or such a matter beforehand.

Q. Before the date for taking final proof?

A. Yes, sir.

Q. Is that your signature upon that paper?

A. Yes, sir, that is my signature.

Q. Is that the paper you signed for relinquishing?

A. Yes, sir.

Q. Whom did you go before to sign it?

A. I think I went before the County Clerk, Charlie Smith.

Mr. HENEY: We will offer that paper in evidence.

The same is marked Government's Exhibit 13.

Q. Whose signature is that upon that paper?

A. That is my wife's signature.

Mr. BENNETT: For what purpose did you offer that paper?

Mr. HENEY: Only for the fact that he relinquished it, and we offer it against all of the defendants.

Mr. BENNETT: We make the same objection to it.

Objection overruled. Defendants except.

Mr. HENEY: We offer this last paper he has identified in evidence also.

Same is marked Government Exhibit 14.

Q. What became of the filing fees? Did you get your filing fees back?

A. Yes.

Q. Who gave them to you?
A. Mr. Gesner.
Q. And those for your wife also?
A. Yes, sir.
225 Q. How about the money you had paid for publishing notice of final proof? Did you get that back?
A. No, sir.
Q. You just got back the $2 that you paid Biggs for filing fees?
A. Oh, yes, I got that back.
Q. You got the money you paid for publishing the notice of final proof back also, did you?
A. Yes.
Q. Who gave it to you?
A. Mr. Gesner.
Q. For yourself and wife?
A. Yes, sir.
Q. What was said about that? How did he come to give it to you?
A. Well, he just paid it back to me.
Mr. BENNETT: This is offered, I suppose, against Gesner.
Mr. HENEY: Yes.

Cross-examination.

By Mr. BENNETT:

Q. When Biggs had the conversation with you about whether you wanted to take up a timber claim, where was that conversation?
A. I think it was at his office.
Q. Who was present?
A. I don't remember that there was anybody.
Q. Did you talk with Biggs about taking up a timber claim before that?
A. No, sir, I don't think I had.
Q. Had you been thinking about taking up a timber claim before that?
A. How is that?
Q. Had you been figuring on taking up a timber claim before that?
A. No, sir.
226 Q. Were there a great many timber claims being taken in that country?
A. There was a good many, yes.
Q. A kind of timber craze up there?
A. Well it was amongst a good many of them.
Q. But you claim it had not struck you yet?
A. Not very much, no.
Q. Had it at all?
A. I don't think it had.
Q. Had you been thinking at all about taking a timber claim before that time?

A. Not very much, I hadn't, no.
Q. You had some, then, I infer, but not very much?
A. Not a great deal, no.
Q. But you had some?
A. Oh, I might have thought about it, something like that.
Q. Had you talked to anybody about it, or do you remember about that? Do you remember whether you had talked with anyone about taking up a timber claim before that, or not?
A. I don't think I had.
Q. You don't think you had?
A. No.
Q. Where did you first see Biggs that day? In his office?
A. I don't remember whether it was in his office; it might have been out on the streets; I don't remember about that part of it.
Q. You don't remember where it was you had the talk with him?
A. No. It seems to me like it was up about his office.
Q. His office was on the ground floor, wasn't it?
A. What?
Q. His office was not upstairs; it was on the ground floor?
227 A. Yes, sir, pretty close to the ground too.
Q. Right on the level?
A. Yes.
Q. Level of the sidewalk?
A. It is not very high off the ground.
Q. Some little ways from the business part of town, up the street wasn't it?
A. Yes, sir.
Q. You think it was in his office that you first had the talk with him?
A. I would not be certain, but I think it was.
Q. That is the way you remember it?
A. Yes.
Q. It was Dr. Gesner's name Mr. Biggs mentioned, was it, as the man who would buy those claims?
A. Yes, sir.
Q. Did he tell you he would loan you the money to prove up on it?
A. He said he would furnish the money to prove up on it.
Q. Did he say anything about whether there was to be a note or a mortgage or anything given?
A. I don't know whether Mr. Biggs said anything about it that day or not.
Q. Some one did, but you don't remember whether it was Biggs or not?
A. I heard Gesner say so.
Q. When you got up there Gesner showed you where the land was and said you could go up there and find the corners, did he?
A. Well, he showed me the land, yes, sir.
Q. Didn't he say you could go up there and find the corners?
A. I don't remember whether he did or not.

Q. At the other trial in answer to a question asked you by
228 Mr. Heney, "What did he say (referring to Gesner), didn't you say "Well, he just told us where the land was; said *he* could go up there and find the corners; showed us where to go."
Did you so testify at the first trial of this case?
A. Well, I think he told us where one corner was, something like that.
Q. I'm asking you—you testified at both of the other trials of this case, didn't you?
A. Yes, sir.
Q. Now I ask you whether or not at the first trial you testified in answer to the question by Mr. Heney, "What did he say," referring to Gesner, did you answer, "Well, he just showed us where to go."
Did you so testify at the first trial?
A. Well, he might have said something to that effect.
Q. I am not asking you what he said, but I am asking you whether you testified in that way at the first trial?
A. Probably I did, yes, sir.
Q. Was it true? Did he just show you where the land was and say you could go up there and find the corners, show you where to go?
A. He showed us where the land was and told us to go up there and look at the land.
Q. Did he tell you to go up there and find the corners?
A. I don't know whether he did or not.
Q. You so testified at the other trial, didn't you?
A. I forget about that part of it.
Q. You forget whether you did or not?
A. Yes, sir.
Q. Immediately afterwards, I having asked you to speak louder, did you repeat your answer and say, "He showed us where to go, where the land was and where we could find the corners?"
229 A. Well, I think that was about right, as I recollect.
Q. Did you go up there to look over the land and find the corners?
A. We went up to look over the land, but I can — say as to whether we found the corners or not.
Q. You don't remember whether you found the corners or not?
A. No, I don't think we did.
Q. Why did you go up there and look over the land? Did you understand that you would have to swear that you had personally examined the land when you came to file on it? Had somebody told you that or had you been informed by somebody that you would have to swear when you applied for the land, that you had personally looked over the land?
A. That is what we thought, yes, sir.
Q. That is the reason you went up there?
A. Yes, sir.
Q. And went to all that trouble so that you could truthfully swear that you had examined the land?
A. That we had seen it.
Q. What?

A. That we had been on the land, yes, sir.

Q. On the first trial of this case when Mr. Heney was asking you in your direct examination about the talk up there with Mr. Gesner, about the mortgage, did he ask you this question: "What did he say?" and did you answer, "Well, he was talking about that he wanted them to give a mortgage, or something, on this land to secure him for the money. Said they would have to."

Did you so testify at the first trial?

A. Well, he asked them for a mortgage.

Q. What?

A. Yes.

230 Q. I am not asking you what the fact is now, but I am asking you what you testified at the first trial. Did you testify in that way in answer to the question, "What did he say," asked by Mr. Heney and referring to Gesner, did you answer, "Well, he was talking about that he wanted them to give a mortgage or something on this land to secure him for the money. He said they would have to."

A. Yes, sir, I think that is right.

Q. Then in answer to a question still asked by Mr. Heney, "What else did he say? Did he say how long the mortgage was to be for?" did you answer, "I don't think he did; he just stated he would like to have a mortgage to make him safe, I suppose, or something like that."

You testified that way, did you?

A. Yes, sir.

Q. Then in answer to the question still asked by Mr. Heney, "Never mind what you suppose, I want to know what he said," did you answer, "Well, that is what he said."

A. Yes, sir.

Q. Then in answer to a question by Mr. Heney, "What did he say," did you answer, "He said, he would have to have a mortgage on the land to secure him on these claims if he put up the money, I suppose that is what he wanted."

A. Yes, sir.

Q. Then did Mr. Heney ask you this question, "Didn't he say he would have to take a mortgage just long enough for you to get your title so as to avoid trouble with the government," and did you answer, "I don't think he mentioned anything about the government?"

A. No, sir, I don't think he did.

Q. Well, did you answer that way at the first trial?

A. Yes, sir.

231 Q. Then did Mr. Heney ask you this question: "Didn't he say he would have to have a mortgage just for a short time until you could get your title, so as to avoid trouble?" And did you answer "I don't think he said anything about trouble?"

A. Yes.

Q. And then did Mr. Heney ask you this question: "Didn't you tell me he did five minutes ago upstairs?" And did you start to answer, "He might have said——" And then did he ask you another question: "Answer that. Didn't you tell me he did five or

ten minutes ago upstairs," and did you answer, "Well, I believe I did tell you that, yes."

Did you answer that that way?

A. I guess I did.

Q. You say Frank Ray and his wife and Mr. Duncan and his wife went up there with you?

A. Frank Ray and his wife and Duncan and his wife came there after we got there. They was there with us.

Q. Who else was there while you were there while this talk was being made?

A. Well, there was just Frank Ray and Cam Duncan and I think my son Frank Beard was there.

Q. Anybody else?

A. Well, there was another man there, but I did not know him.

Q. Do you know what his name was?

A. I heard it, but I have forgotten it. I don't know what his name is.

Q. Was it Mr. Brandon?

A. I think that is the name, yes, sir.

Q. Where does he live?

A. I could not tell you. I never seen him before nor since.

Q. Who did he go up there with, if you know?

232 A. I could not tell you who he went with; he was a horseback.

Q. When you went in to see Biggs about your filing you told him what land you wanted to file on, did you?

A. I had the numbers, yes, sir.

Q. Who went in there with you? Who was in Biggs' office while you were there?

A. My wife and Cam Duncan and his wife, and Frank Ray and his wife.

Q. Did they all have their numbers?

A. Yes.

Q. Told him what land they wanted to file on?

A. Yes.

Q. Do you know who gave you the description you had of the land? Do you remember whether it was Graves, or Gesner, or whether you figured it out yourself while you were up there?

A. I think it was Mr. Graves.

Q. You think it was Mr. Graves, the surveyor?

A. Yes.

Q. Did you ask Graves for the description?

A. I could not say as to that, whether I did or not.

Q. It has been discussed down there a good deal, hasn't it Mr. Beard?

A. Well, not until we have been down there.

Q. Not until this trouble came up?

A. No.

Q. From the time there was the first anticipating of trouble it has been talked over a good deal, hasn't it?

A. I think it has, yes, among the parties.

Q. You have heard other parties discuss it and tell what their understanding was, about the transaction?

A. Oh, I might have heard them talk about it, yes.

233 Q. It is pretty hard to distinguish at this length of time just exactly what was said up there, from the talk you may have had among -ourselves and the ideas you got in that way, isn't it?

A. Yes, sir, it is.

Q. You paid your own fees, you say?

A. Yes, sir.

Q. And for your wife, too?

A. Yes, sir.

Q. Your filing fees and publication fee?

A. Yes, sir.

Q. You did not send these filing papers to the land office: you understood Mr. Biggs was to send them for you?

A. How is that?

Q. You did not send these filing papers to the Land Office yourself; you understood Mr. Biggs was to send them for you? You understood he was to send them down there for you as commissioner?

A. Yes, sir, he was to send them, I think.

Q. When you testified on the first trial about the talk with Dr. Gesner about not proving up, you were asked this question by Mr. Heney, weren't you, "What was the talk?" and did you answer "Well, the talk was, he said I had better go ahead and prove up; he wanted me to go ahead and prove up; and I told him I did not believe I wanted to. Q. Is that all that was said? A. That was all that was said that amounted to anything. Q. Do you recall anything else? A. No, sir."

Did you so testify?

A. I guess I did, yes.

Q. Now, Mr. Beard, you want to add that there was something else said in this conversation about your wife not proving up?

A. I want to add something?

Q. Yes. You say now that there was something said about 234 your wife not proving up. You did not tell that in the other trial, and you testified that you had told everything that was said that you could recall, didn't you?

A. Nothing said about her proving up only Mr. Gesner said he didn't want her to prove up, that is all that was ever said about it.

Q. Well, you testified at the other trial in answer to the question, "What was the talk" A. Well, the talk was, he said I had better go ahead and prove up; he wanted me to go ahead and prove up; and I told him I didn't believe I wanted to? Q. Is that all that was said? A. That was all that was said that amounted to anything. Q. Do you recall anything else? A. No, sir."

A. He never asked me in regard to the women.

Q. Well did you answer those questions in the way I have read to you.

A. I think I did, yes.

Q. Now at the first trial on the cross examination, in answer to the question, "Q. Haven't you been inquiring from Mr. Biggs and others as to whether they knew any place where you could borrow money to prove up on a timber claim?" And did you answer, "I don't recall having any talk with Mr. Biggs like that. Q. Do you remember talking with others up there at Prineville about that matter? A. Oh, I don't know; I might have such talk with others. Q. You had that in mind, had you, for some little time; everybody was talking timber claims up there pretty near, weren't they? —. Everybody was talking about it; but I never thought very much about taking up timber claims. Q. What? A. I never had much intention of taking a timber claim that I know of, not before that. Q. But you had been thinking about it, hadn't you? A. Oh, I might have thought about it, yes. Q. But you don't remember whether you had ever made inquiry as to whether there was anyone that would loan you the money, or not? A. Of course me and Mr. Biggs might have had some talk like that; I couldn't say; I don't recollect. Probably we might for all I know."

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Did you so answer those questions?

A. Yes, sir.

Q. That is true is it?

A. I think I answered that way.

Q. What say?

A. Yes, sir, I think it is.

Q. At the time Biggs had this talk with you which you have testified about did he tell you in that same conversation that Dr. Gesner was having trouble with his range up there, with the cattle men and he was anxious to have the people take up the timber land so that he could make some arrangement about the range?

A. Yes, sir, he said something in regard to that.

Q. Something to that effect?

A. Yes.

Q. There were a good many timber locators in that country at that time, wasn't there?

A. Yes, sir, there was several.

Q. A great many people coming in from the east and locating timber claims all through the country?

A. A good many of them.

Q. Coming in in stage loads, weren't they?

A. Yes.

Q. Coming in on the cars to Shaniko and from Shaniko to Prineville by stage?

A. Yes, sir.

Q. And there was a number of people engaged in locating them?

236 A. Yes sir.

Q. These locators would go around and show them the lands?

A. Yes, sir.

Q. And charged them so much for locating them?

A. Yes, sir.

Q. How far was it from the shearing plant to the land you took?
A. I don't think it was much over a quarter of a mile. It might have been a little further.
Q. At that time up there did not Dr. Gesner tell you when he was making that talk in that conversation, that he would not buy the land at that time or make any contract for it, and that you could not, all of you there?
A. I think he mentioned something about that, yes.
Q. He said that in substance, didn't he?
A. I think he did.
Q. You so testified at the other trial, and that is true, and he said it would not be lawful for you to make any contract to sell it or for him to make any contract to buy it, didn't you?
A. Well, I don't know as to that part of it, what he said about that.
Q. He did say something about that, didn't he?
A. He said something about that, yes.
Q. What say?
A. He was talking something about that.
Q. Didn't you testify at the other trial in answer to this question, "Q. And that he explained to you that it would not be lawful for you to make any contract to sell it, nor for him to make any contract to buy it? A. Yes, he stated them words all right."
A. I think he did, yes, sir.
237 Q. You so testified before?
A. Yes.
Q. And you think now that he did state those words all right?
A. I think he did, yes.
Q. That it would not be lawful for you to make a contract to sell it, nor for him to make a contract to buy it?
A. Yes, sir.
Q. You understood then that you had not made any contract to sell the land? You were told up there that you could not make any?
A. No sir, we hadn't made any contract, to any extent.
Q. What say?
A. We didn't have no contract; no written contract.
Q. You did not make any contract?
A. No.
Q. You were told you could not make any contract?
A. Yes, sir.
Q. And you did not make any?
A. We had an understanding.
Q. Well, that was just something that you gathered in your own mind, that you expected to do; but you did not agree to do anything, did you?
A. I didn't exactly agree to do anything. Of course we had an understanding amongst ourselves.
Q. Yes, you expected to sell it to him?
A. I expected to let him have it, yes, sir.
Q. If you could not do any better.

A. Well, there was nothing said about doing better, anything of the kind.

Q. Nothing said about that one way or the other?

A. No, sir.

238 Q. Nothing said that would prevent you doing better if you could?

A. No, sir.

Q. There was no contract, no oral or written contract, or any kind of contract, only just an expectation on your part to sell it?

A. That is all.

Mr. HENEY: That is asking for a conclusion. The witness has stated what was said.

Objection sustained.

Q. You testified at the other trial, didn't you, that there was not a word said as to whether you would sell the land or not; that you did not say anything one way or the other?

Mr. HENEY: I asked that the witness's attention be called to the place where he ever made any such statement at the other trial. Show him the testimony.

The COURT: Give him the time and place.

Q. I will ask you this question: Isn't it true that you did not say a word one way or the other up there, as to whether you would sell that land to Dr. Gesner, or not, when you were talking to him?

A. That I did not say a word?

Q. Yes. That you did not say a word as to whether you would sell the land or not. He just made this talk to you and you went on and filed on the land?

A. I don't think we did say anything, but it was the understanding that he was to get the land.

Q. What say?

A. I don't think we did.

Q. You don't think there was a word said?

A. No; but it was the understanding he was to get the land.

239 Q. That was just an understanding or something that you got in your mind?

A. I don't know whether it was or not.

Q. He told you he could not make a contract to buy the land, and you could not make a contract to sell it, didn't he?

A. Of course he said something to that effect, yes.

Q. In this sworn application you swore, did you not, when that matter was all fresh in your mind that you had not made any agreement or contract in any way or manner, with any person or persons whomsoever by which the title you might acquire from the Government might inure in whole or in part to the benefit of any person except yourself. You swore you had not made any agreement or contract in any way or manner, didn't you?

A. I don't know whether I read them papers or not.

Q. What say?

A. I don't believe I ever read them papers.

Q. You don't think you ever read them?
A. No.
Q. Do you claim they were not read to you?
A. I don't think they was.
Q. You think you swore to this without reading it?
A. I think we did, yes.
Q. At the other trial in this case when you were asked about this matter on the first trial, did you not testify in answer to the question, "You state in this affidavit, I believe, that you signed, that you had not made any contract for the sale of the land," you answered, "No, I had not made any definite contract for the sale of the land." You stated in the affidavit that you had not made any contract at all, didn't you? A. Well, I hadn't made a contract, any binding contract, no. Q. You have not made any contract as a matter of fact at all, have you?

240 A. Well, there was no contract between us. Q. Either in writing or orally or any other kind of contract. It was absolutely true what you swore in your affidavit, was it? A. Yes, as near as I know that was true. Q. You understood it to be true at the time? A. Yes, sir. Q. You were not swearing to any falsehood in this matter? A. Not if I know it, no. Q. ——. —. Certainly I did. Q. If you had not believed it to be true you would not have sworn to it? A. No, sir."

Did you so testify?
A. Yes, sir, I did.
Q. Did you further testify at the same time in relation to the reading of the affidavit, "Q. That affidavit was read over to you wasn't it? A. This one here (referring to the one that has been offered in evidence here signed by you). Q. Yes. A. I don't think so. Q. What say? A. To-day, you mean? Q. No, when you signed it, at the time you signed that affidavit Mr. Biggs read it over to you, didn't he? He read it over to you carefully, didn't he, and did he have you read it over too to yourself? A. I think he did; I think I read that all over, yes." Did you so testify in answer to the question particularly, "And did he have you read it over too to yourself? A. I think he did; I think I read that all over, yes."
A. Probably I did all right, but I don't recollect about reading it.
Q. You don't recollect now about reading it?
A. Yes, probably I might have, but I don't recollect whether I did or not.
Q. You testified at the first trial didn't you in substance that "Q. If anybody else wanted to buy the land and would give you more for it, you had a right to sell it to them." And you answered, "We would have that privilege I suppose."

241 A. I think we did, yes.
Q. In answer to the question, "But if Dr. Gesner, if you could not sell it to somebody else, Dr. Gesner would give you that much for it, would buy it for you and give you that much for it? A. Yes, that is what he said."
A. I don't recollect about that; I might have answered it that way. I don't recollect.

Q. What say?
A. I might have answered that in that way.
Q. But you don't recollect?
A. No.
Q. During the talks you had with Dr. Gesner up at the shearing plant while you were up there, didn't he tell you people up there that the reason why he wanted the home people to take this land all over the country, was that if you home people got it he would have a chance to get the range from you?
A. I don't recollect whether I heard him say that or not.
Q. Didn't you testify in the other trial in answer to this question, "Now during these talks you have had that you have testified about in answer to Mr. Heney's questions, that talk up there at the shearing plant while you were up there, didn't he tell you people up there that the reason why he wanted the home people to take this land rather than outsiders that were coming in and taking timber land all over the country, was that if you home people got it he would have a chance to get the range from you, and didn't you answer, "I think there was something said about that, yes."
A. I think he said something about letting the home people have it or something of that kind, yes.
Q. Didn't you answer or did you not to the question I have
242 asked in the way I have indicated?
A. I think there was something said about that, yes.
Q. I am asking you what you testified to at the last trial. Did you at the first trial, in answer to the question I have asked you, testify as I have asked you? Do you want me to repeat that question?
A. I think that is about right.
Q. You think you did testify to that?
A. Yes, I think that is about right.
Q. You think you did testify to that?
A. I think so, yes.
Q. In answer to my question immediately afterward, "And that he rather see you home people get the benefit of it if there was any to a timber claim," did you answer, "Yes, I think he did?"
A. Yes, sir, I think that is right.
Q. Wasn't this question asked you at that trial, and didn't you answer in this way: "Now isn't it a fact that the way the talk came about the sale up there, was this, that several of you were together up there about the shearing plant, and were wondering if you would sell the timber claims after you took them up, and Dr. Gesner spoke up, he being present, and said, "You needn't feel uneasy, for we may buy some of it if things come our way," or something to that effect, and did you answer, "Well, he might have said that, but I don't recollect hearing him say that. He might have said that to some of them, but I don't recall hearing him say that."
Is that right?
A. Yes sir.
Q. Do you remember Dr. Gesner telling you up there in that con

versation that he had taken legal advice as to what he could lawfully do in the matter?

243 A. How was that?

Q. Do you remember Dr. Gesner telling you in the course of that conversation up there at the shearing plant that he had taken legal advice as to what he lawfully had a right to do in the matter?

A. I don't recollect. He might have said something about it, but I can't recollect it.

Q. You don't recollect whether he did or not?

A. No.

Q. At the time Dr. Gesner paid you back your filing fees after you had concluded to relinquish, did he tell you he had had the advantage of the range up there and it was no more than right that he should pay and you should not lose anything in the matter?

A. How is that?

Q. Did he tell you that as he had had the advantage of the range up there, the grass, that it was no more than right that you should not lose anything.

A. I don't recollect whether he did or not.

Q. At the second trial of this case in relation to this paper, were you again asked whether you read it over, the question being, "You were sworn to these papers when you filed, were you? A. These lying on the table here?" (Referring to these). "Q. Yes. A. Yes, sir. Q. Were they read over to you before you signed them? A. I don't think they was; I think he just handed them over to us to read ourselves. Q. Oh, you read it yourself, as you remember? A. Yes, sir."

A. Since I came to think about it, I think that is about the way of it.

Q. You do say now, since you come to think about it, that

244 you did read these over?

A. I think we did.

Q. And knew what was in them?

A. I think we read them over, yes; but I don't think he read them to us.

Q. But you read them over yourself?

A. I think we did.

Q. Are you sure whether he read them over or not?

A. I am not sure.

Q. You are not sure whether he read them and handed them to you?

A. I am not, because I can't recollect whether he did or not.

Redirect examination:

Q. Mr. Beard, were you subpœnaed before the Grand Jury in February of this year?

A. Yes, sir.

Q. After that you returned to Prineville?

A. Yes, sir.

Q. From that time until the present, until you came down here to the present trial, have you not heard a great deal of feeling ex-

pressed in Prineville and vicinity against any witness who would testify against Williamson and Gesner?

Objected to.

Mr. HENEY: I think we have a right to show the circumstances under which the witness is testifying. It is true he is our witness, and we do not purpose to impeach him; but we think in order that the jury may weigh the testimony properly we are entitled to show the conditions and circumstances surrounding him and under which he testifies.

The COURT: It will not be material unless you contend that it might have some effect upon him.

245 Mr. HENEY: I do contend that.

Mr. BENNETT: They can not impeach their own witness in that way, and it would be to that extent impeachment, and they can not brace or bolster up their witness, by showing that something may have happened.

The COURT: The witness is apparently reluctant. I think that is a fair comment; either reluctant or does not fully comprehend the questions. It being the contention of the District Attorney that that reluctance is due to any extraneous cause, I think he would have a right to show it. If it be simply that the witness is not alert in his comprehension it would not be material. You may go ahead.

Defendants except.

Q. Have you not heard a great many expressions of feeling, and is it not quite generally expressed in Prineville and vicinity, that a witness ought not to testify against Williamson and Gesner?

Mr. BENNETT: I object to that as leading, incompetent, immaterial and an attempt to brace up their own witness.

The COURT: I think you can avoid that by not leading the witness.

Q. Have you heard any expressions——

A. Oh, I have heard——

Q. Wait until I finish the question. Have you heard any expressions of opinion in Prineville and vicinity as to how the witnesses for the Government ought to testify in this case?

A. No, sir, I have not. Nobody has ever talked to me anything about it.

Q. No one has ever talked to you. Has C. Sam Smith ever talked to you at all?

246 Same objection.

A. No, sir. Sam Smith has never had any talk with me whatever.

Q. Have you heard the witnesses while here in the court house and up there talking about that question?

A. Very little.

Q. You have heard some talk?

Objected to as immaterial and incompetent.
Overruled. Defendants except.

Q. Do you know a man named Lewis who runs a saloon in Portland?
A. I know him; I am not much acquainted with him.
Q. The saloon is up the street here a few blocks.
A. I understand it is. I used to see him when he was at Prineville, had a ranch out there.
Q. He is a brother-in-law of Dr. Gesner, is he?
A. I could not tell you, I don't know.
Q. You have been at his saloon, or were you there during the first trial of this case?
A. I was up there once or twice; up to Ed White's.
Q. Have you seen any of the other witnesses there?

Objected to as immaterial and incompetent.
Overruled. Defendants except.

A. Yes sir, there was two or three there all right.
Q. Each time that you were there?

Same objection. Same ruling. Same exception.
The COURT: I understand this all goes in subject to your objection as to its admissibility.

A. Yes, sir, there were two or three there each time I was there.
Q. Who were they?
A. Well, I don't remember. I think Emmet Holman was one, I think John Watkins.
247 Q. Was Watkins there both times?
A. I could not say as to both times. He was there once.
Q. Do you recall any others?
A. I know there was another one or two there, but I have forgotten what their names were.
Q. While you were there did you hear Lewis express any opinion about the case?
A. Mr. Lewis wasn't there.
Q. He was not there when you were there, neither time?
A. No, sir.
Q. Did you see Dr. Gesner there?
A. No, sir.
Q. Who was tending bar when you were there?
A. I think his name was Barney.
Q. Is he from Prineville too?
A. Yes, sir, he used to be up there.
Q. Did he express any opinion while you were there?
A. None that I heard.
Q. How long were you there?
A. Just a short time; probably two or three minutes something like that.
Q. You were asked about your testimony at the second trial of this case by Mr. Bennett on a certain point, and if you did not testify as follows: "Now, then was not this question asked you immediately

after and didn't you make this answer; (Referring to the first trial) Didn't you say he would have to have a mortgage just a short time until you could get your title so as to avoid trouble, and didn't you answer, I don't think he said anything about trouble. Do you remember answering, yes, sir, that is correct. A. Yes, sir," And then you were asked the question by me, "Didn't you tell me he
248 did five minutes ago upstairs," and didn't you make answer "He might have said——" and that question was not complete, and then the question was asked, "Answer that. Didn't you tell me he did five minutes ago upstairs, or ten minutes ago? A. Well, I believe I did tell you that, yes, sir. Q. Were you not telling me the truth? A. Yes, sir, I think I was telling you the truth."

Mr. BENNETT: To that last question we desire to object.

Mr. HENEY: That last part of it was left off by Mr. Bennett in his examination.

Mr. BENNETT: I think that is merely calling for the opinion of the witness, and we object to it as immaterial and incompetent.

Objection overruled.

Defendants except.

Q. Did you so testify at the last trial?

A. Yes, sir.

Q. And then the question was, "Were you not telling me the truth?" to which you answered, "Yes, sir, I think I was telling you the truth."

A. I don't understand the question.

Q. The question was whether or not you did not tell me upstairs before coming down here that Dr. Gesner did tell you up in the timber that he had to take a mortgage to avoid having trouble; and then the question was asked if you did not tell me that upstairs, and you said yes, then the question was asked you, "Well, wasn't you telling me the truth when you said that upstairs," and you
249 answered, "Yes, sir." Is that the way you testified the last time?

A. Yes, sir, that is right.

Q. Now, up in the timber at the time Dr. Gesner was talking to you about not being able to make a contract to buy or sell, didn't he say to you that while he could not as a matter of law make a contract to buy, or you to sell, that it was all right, that he would have to take a mortgage for a short time until you got title so as to avoid trouble with the Government, and that it was all right, that as soon as you got title he would give you the $500 for the land.

Objected to as leading and putting the very words in the witness's mouth.

Objection overruled. Defendants except.

Q. Yes, sir, he said that.

Q. And he gave you to understand that you could not enter into a written formal contract, but that you could rely on his taking the land for the $500 as soon as you got the title?

A. Yes, sir.

Mr. BENNETT: That we object to as calling for the conclusion of the witness and as leading.

Question withdrawn and the answer stricken out.

Q. At the time you were making your filing you understood that Gesner had in effect promised that he would buy the land for the $500 as soon as you got title; furnish money for you to prove up on, and that he expected you to convey it to him for that money in consideration of his furnishing the money to prove up, did you not?

A. Yes.

Same objection. Objection overruled. Defendants except.

250 Q. Have you answered?

A. Yes.

Q. Now, did Biggs, at the time you were signing that paper warn you or say anything to you to effect that you had no right to have any tacit understanding with Dr. Gesner that you were going to convey the land to him for a fixed price as soon as you got title?

A. No sir, he never said nothing about it.

Q. Did you think it was unlawful to have such an understanding, provided it was not put in writing.

Objected to as incompetent and calling for the conclusion of the witness.

Overruled. Defendants except.

A. I did not think we were doing anything wrong when we were signing that.

Q. And that belief was based on what Gesner had said to you up in the timber about what you could do?

Objected to as incompetent and immaterial.

Q. Well, what was it based on? Did Biggs say anything to you about it?

A. No, sir, Biggs never said anything to me about the papers.

Q. Did Biggs explain to you that because you were going to make $75.00 out of it that the $75.00 was for your benefit and therefore you could swear that you were taking it for your own exclusive benefit, or anything to that effect?

Objected to as incompetent and putting words into the mouth of the witness.

The COURT: I have ruled that counsel may lead the witness, but no more than is absolutely necessary.

Mr. HENEY: I will not, your Honor. It is not proper for
251 me to state all this witness has said to me outside of court, or the affidavits he has made, nor is it proper for me to state what other witnesses have testified or stated to me outside of court under oath.

Mr. BENNETT: No, and I don't think counsel ought to intimate that anything has been said to him or any statements made on the outside.

Mr. HENEY: No, the district attorney ought to permit the at-

torney for the defendants to intimate everything, and not re-examine upon it and let the jury be misled.

Objection overruled. Defendants except.

A. I don't think he did.

Q. Did you and the others coming down from the timber have any talk with reference to whether or not you could hold Gesner to the agreement, if he did not want to carry it out after you got the land?

Objected to as immaterial and incompetent.

Overruled and defendants except.

A. I don't think we did. I don't recollect that we did.

Q. Or that any other time prior to making final proof or prior to filing?

Same objection.

Overruled. Defendants except.

A. I don't recollect.

Q. Did Biggs tell you that you had to go up to the land and see it before filing on it?

A. I think he told us we would have to go up there, something to that effect; have to go up to see the land.

Q. Did you have the money on hand to take up a timber claim for yourself and your wife at that time?

252 Objected to as immaterial.

Objection overruled. Defendants except.

A. No, sir, I did not.

Recross examination.

Q. Counsel has asked you about whether Biggs told you it was wrong to have a tacit agreement with Gesner, and there was nothing said between you and Biggs about a tacit agreement at all, was there?

A. How is that?

Q. There was nothing said between you and Biggs about a tacit agreement, was there?

A. I think not.

Q. Counsel has asked you if you had the money and you said you had not. You meant you did not have the money without borrowing it?

A. Yes, sir.

Q. Did you understand when you were making that affidavit that a poor man who did not have money without borrowing it was shut out from taking a timber claim at all, or did you understand he had a right to borrow the money and take a claim, or did you know anything about that one way or the other?

A. Well, I supposed a man could borrow it all right.

Excused.

253 Afternoon Session.

SEPTEMBER 9, 1905—2 p. m.

GREEN BEARD recalled on part of the plaintiff.

Direct Examination.

By Mr. HENEY:

Q. Mr. Beard while you were on the stand a while ago, did you tell all that was said by Mr. Gesner when he was talking to you and Frank Ray and these other parties there in the timber?
A. No, sir.
Q. What else was said that you recall?
A. He said when the time came to prove up he would furnish the money to prove up on, and after we got the title he would pay us the balance, and he wanted to know if we were satisfied with that?
Q. How is that?
A. He wanted to know if we were satisfied and I said yes.

Cross-examination.

By Mr. BENNETT.

Q. Whom have you talked with since you were on the stand before?
A. Nobody.
Q. Talked with Mr. Heney?
A. Not to amount to anything, no, sir.
Q. Have you talked to him about this matter you have just testified about?
A. No, sir.
Q. Did you talk to Mr. Burns?
A. No, sir.
Q. Did you talk to Mr. Neuhausen?
A. No, sir.
Q. Not at all?
A. No, sir.

254 Redirect examination:

Q. You told me you had left this out?
A. You must — asked me if I told it all and I told you No, sir, I hadn't told it all.

Recross-examination.

Q. Who asked you if you had told it all?
A. Mr. Heney asked me if I had left that out and I told him I had.
Q. He suggested that you had left that out?
A. Yes, he asked me if I had told it all, and I told him I hadn't.
Q. Did he mention this matter and ask you if you had left it out?
A. Yes, sir.

Re-redirect examination:

Q. How did I mention the matter or did I mention it?
A. You asked me if I had told it all, and I told you, No sir, I had not. You did not mention this matter at all.
Q. Had you ever told me that matter before?
A. No, sir.
Q. Did I mention it to you at all?
A. No, sir.
Q. Why didn't you tell it this morning?
A. The question was not asked me and I didn't think I had to.
Q. Don't you want to tell anything unless you have to, to hurt these defendants?

Mr. BENNETT: I object to that.

A. I didn't feel like telling it unless I was asked.

Objected to as leading, incompetent and improper in every regard.
Overruled. Defendants except.

Q. What is your answer.
A. How is that?
255 Q. Didn't you want to tell anything unless you had to, or tell it unless you had to?

Same objection.
Overruled. Defendants except.

A. Well, I didn't think I had to tell it unless—the question was not asked me about that.
Q. Didn't you want to tell it unless you had to?

Same objection.
Overruled. Defendants except.

A. I did not like to tell it unless I had to, no.
Q. You did not like to tell anything that would hurt these defendants, unless you had to, is that it?

Same objection.
Objection sustained.

Re-recross examination:

Q. And so you were so anxious in relation to this matter that as soon as you got outside you went to the district attorney and volunteered as you claim now, to tell him that there was something else that you could tell that he had not asked you about?
A. No, sir, I did not do that.

Excused.
Whereupon Court adjourned until 9:30 a. m. Monday, September 11, 1905.

256 During said trial one John F. Watkins, being called as a witness for the Government, and having testified that he was sent up by Biggs to the vicinity of the land in question, and that he went up to the land and found the defendants Williamson and Gesner at the land; That they were surveying in that vicinity: That they showed him and others with him claims upon which they might locate: That he returned and went before Biggs and filed on the lands, his application being similar to the one hereinbefore set forth, and being admitted subject to the exceptions and objections hereinbefore mentioned. Whereupon the following questions was asked of said witness, "What was your intention at the time you signed this, as to what you would do with the land, if anything, when you got it?" to which each of the defendants then and there objected as being incompetent and immaterial and not in any way binding upon said defendants, but the objection was overruled and each of said defendants excepted to said ruling, whereupon the witness answered, "I intended to convey it to that company, Williamson and Gesner," and thereupon said witness having testified that he afterwards made final proof before Mr. Biggs, and his final proof papers having been identified by him, were offered in evidence: to their introduction each of the defendants objected as being incompetent and immaterial and not in any way binding upon either of defendants, and being the act and declaration of an outside party made after the accomplishment of the act alleged to be the object of the conspiracy, but the objection was overruled by the court, to which ruling the defendants excepted, and thereupon said paper was read in evidence to the jury and was as follows:

4–379.

Timber and Stone Lands.

Testimony of Claimant.

257 JOHN S. WATKINS, being called as a witness in support of his application to purchase the N.E. ¼ of Section 24, Township 15, South, of Range 19, East W. M., testifies as follows:

Question 1. What is your age, post office address and where do you reside?

A. 43. Prineville, Oregon. Crook County, Oregon.

Question 2. Are you a native born citizen of the United States, and if so in what state or territory were you born?

A. Yes, in Oregon.

Ques. 3. Are you the identical person who applied to purchase this land on the 21st day of July, 1902, and made the sworn statement assigned by law before the Register (or Receiver) or United States Commissioner on that day?

A. Yes.

Ques. 4. Are you acquainted with the land above described by personal inspection of each of its smallest legal sub-divisions?

A. Yes.

Ques. 5. When and in what manner was such inspection made?
Ans. In July, 1902, personal inspection.
Ques. 6. Is the land occupied; or are there any improvements on it not made for ditch or canal purposes, or which were not made by or do not belong to you.
Ans. No.
Ques. 7. Is the land fit for cultivation, or would it be fit for cultivation if the timber were removed?
Ans. No.
Ques. 8. What is the situation of this land, and what is the nature of the soil, and what causes render the land unfit for cultivation?
Ans. Hilly, rough and rocky, and the soil is not fit for cultivation.
Ques. 9. Are there any salines, or indications of deposits of gold, silver, cinnabar, copper or coal on this land? If so state
258 what they are and whether the springs or mineral deposits are valuable?
Ans. No.
Ques. 10. Is the land more valuable for mineral or any other purposes than for the timber and stone thereon, or is it chiefly valuable for timber or stone?
Ans. Timber.
Ques. 11. From what facts do you conclude that the land is chiefly valuable for timber or stone?
Ans. It is rough, hilly and rocky, and is covered with ordinary good timber.
Ques. 12. What is the estimated market value of the timber standing upon this land?
Ans. About $800.
Ques. 13. Have you sold or transferred your claim to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract in any way or manner with any person whomsoever, by which the title which you may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except yourself?
Ans. No.
Ques. 14. Do you make this entry in good faith for the appropriation of the land exclusively to your own use and not for the use or benefit of any other person?
Ans. Yes.
Ques. 15. Has any other person than yourself, or has any firm, corporation, or association, any interest in this entry you are now making, or in the land or in the timber thereon?
Ans. No.

JOHN S. WATKINS.

I hereby certify that the above named John S. Watkins personally appeared before me: That I verily believe affiant to be the person he represents himself to be; and that each question and answer in the foregoing testimony was read to him in my presence before he

signed his name thereto, and that the same was subscribed and sworn to before me at Prineville, Oregon, this 8th day of December, 1902.

M. R. BIGGS,
U. S. Commissioner for District of Oregon.

NOTE.—Every person swearing falsely to the above deposition is guilty of perjury and will be punished as provided by law for such offense. In addition thereto the money that may be paid for the lands is forfeited, and all conveyances of the land or of any right, title or claim thereto, *was* absolutely null and void as against the United States.

259 I hereby certify that I have tested the accuracy of affiant's information and the *bona fides* of this entry by a close and sufficient oral cross-examination of the claimant, and his witnesses, directed to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure in whole or in part to the benefit of any person or persons except himself, and am satisfied from such examination that the entry is made in good faith for entryman's own exclusive use and not for sale or speculation, nor in the interest nor for the benefit of any other person or persons, firm or corporation.

M. R. BIGGS,
U. S. Commissioner for District of Oregon.

And thereupon the Government further offered in evidence the cross-examination of said claimant made in connection with said final proof, to which each of the defendants then and there objected as incompetent and immaterial, and not in any way binding upon either of the defendants, and being the act and declaration of an outside party made after the accomplishment of the act alleged to be the object of the conspiracy, but the objection was overruled and the defendant excepted to the ruling of the court and the paper was read in evidence and was as follows:

Timber and Stone Lands.

Cross-examination of Claimant in Connection with Direct Examination.

On Form 4-370.

Before taking the testimony the Register and Receiver will read or cause to be read to the witness, section 2392 of the Revised Statutes in regard to perjury—see bottom of page on Form 4-371—and see that witness understands same.

260 Question 1. Are you an actual *bona fide* citizen of this State? Yes.

Question 2. Are you married or single? Married.

Question 3. Where did you reside prior to becoming a resident of this State, and what was your occupation. Born and raised in Oregon. Am a farmer.

Question 4. How long have you been an actual resident of this State, and where have you lived during all of this time? 43 years. Linn and Crook Counties.

Question 5. What has been your occupation during the past year, and where and by whom have you been employed and at what compensation? Farming for myself.

Question 6. How did you first learn about this particular tract of land and that it would be a good investment to buy it? In July, wanting to take timber went up in the timber and located this land.

Question 7. Did you pay or agree to pay anyting for this information. If so, to whom and the amount? No.

Question 8. Have you made a personal examination of each smallest sub-division of said land? If so state when and under what circumstances and with whom? Yes, in July, with my wife and daughter, Wilfred J. Crain and George M. Gaylord.

Question 9. How did you identify said land? Describe it fully? By Government corners as N.E. ¼ Sec. 24, Tp. 15, S. R. 19 E. W. M.

Question 10. How many thousand feet, board measure, of lumber did you estimate that there is on this entire tract, and what is the stumpage value of same? One and a half million feet, at fifty cents per M.

Question 11. Are you a practical lumberman or woodman? If not how did you arrive at your estimate of the quantity and value of the lumber on the land? I have worked a great deal in the woods.

261 Question 12. What do you expect to do with this land and lumber on it when you get title to it? I expect to use it the best I can.

Question 13. Do you know of any capitalists or company which is offering to purchase timber land in the vicinity of this entry? If so, who are they and how did you know of them? No.

Question 14. Has any person offered to purchase this land after you acquire title? If so who and for what amount? No.

Question 15. Where is the nearest and best market for the timber on this land at the present time? Prineville, Or.

Question 16. Did you pay out of your individual funds, all the expenses in connection with making this filing and do you expect to pay for the land with your own money? Yes.

Question 17. Where did you get the money with which to pay for this land and how long have you had same in your actual possession? Made it out of my hay crop of this year; had it about two months.

Question 18. Have you kept a bank account during the past six months, and if so, where? No.

In addition to the foregoing the officer before whom the proof is

made will ask such question- as seem necessary to bring out all the facts in the case.

JOHN S. WATKINDS.

The following is all the testimony of the aforesaid witness John Watkins introduced at the trial:

262 Third Trial.

SEPT. 12, 1905.

JOHN F. WATKINS, being first duly sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. HENEY:

Q. Where do you live?
A. Prineville.
Q. How long have you lived there?
A. About six years.
Q. What business are you in?
A. I have been farming and raising hay.
Q. Do you know the defendants, Williamson, Gesner and Biggs?
A. Yes, sir.
Q. How long have you known Mr. Williamson?
A. About six years.
Q. And Biggs?
A. Six years.
Q. Did you file on a timber claim in 1902?
A. Yes, sir.
Q. Who, if anybody, spoke to you about filing before you filed?
A. Campbell Duncan was the first man that spoke to me about it. I think Mr. Biggs probably was the next man that pretended to know anything about it.
Q. After Duncan spoke to you about it what did you do?
A. I went to see Mr. Biggs.
Q. What conversation did you and Biggs have?
A. Mr. Biggs told me that Williamson and Gesner wanted people around there to file on timber claims in a body of timber about twenty-five miles east of Prineville; they would furnish the money to
263 pay the expenses and when they got their patent they would give them $500 for it.
Q. What did you say?
A. I don't remember what I said; I didn't exactly state in with it at that time. I asked him if it would be lawful to do it, to make contracts that way, and he said, they wasn't making any contracts, merely an understanding. But I didn't like it at that time, and I went home. But later on I went on up and seen him again and made up my mind to go and file on a timber claim, me and my folks.
Q. What, if anything, did he say about the folks?

A. Well, he spoke about them, that they could go to-, the four of us, me and my wife and my son-in-law and his wife.

Q. Did he say anything about the terms?

A. Well, on the same terms, yes, sir.

Q. When you went to the timber, who all went and how long after that was it?

A. I think that was in the first of July, and when we went it was about the middle of July; maybe a little later than the middle; me and my wife went and my son-in-law and his wife and a man by the name of Gaylord.

Q. Was Gaylord working for you at that time?

A. Yes, sir.

Q. When you got up there whom did you find?

A. Down there at the timber?

Q. Yes.

A. I found Mr. Williamson and Gesner and Graves and Henry Beard and one of the Wakefields.

Q. Now go on and tell the jury all that happened after you got up there.

264 A. Well, we got up there about noon. We had our dinner there. When we got there, Mr. Williamson—I can't state of all that happened, there was a good deal of talk, but I can tell what I remember of about this business. He told us we was about the middle of the section, and the timber was about alike all over, and it was 24-15-19. And he took my book and put the numbers down in it. And Gaylord was there and he put his numbers down in the book too. That was in another section, in 28 I think. I don't remember anything more that was about that than that. He told us we could go and file on it. That is all I can think of.

Q. Now, what if anything, did you say to him about Gaylord? Did you introduce Gaylord to him?

A. Yes, sir, I introduced Gaylord to Mr. Williamson.

Q. What did he say and what did you say if you remember?

A. I told him he wanted to take a timber claim too, I think, and I thought he would be all right for one; he would have his wife, is what I meant. I don't remember what he said to Gaylord.

Q. When did you return home?

A. We went home that same day.

Q. When did you file with reference to that?

A. We filed the next day.

Q. Before whom did you file?

A. Mr. Biggs.

Q. Do you remember who was present when you filed?

A. No, I don't remember who was present. My wife was there I think, and my daughter, who filed at the same time we did. That is all I remember of being there.

Q. Was your signature upon these two papers?

A. Yes, sir.

Q. Are these the papers you signed at the time of filing?

265 A. Yes, sir; I think they are.

Mr. HENEY: We will offer these in evidence. They are dated July 19, 1902.

The same are admitted and marked Government's Exhibit "27" and "27A."

Q. At the time you signed this, was it read to you or did you read it yourself?

A. I don't remember certain whether it was read to me or not. I suppose it was.

Q. Do you remember this statement in it, "that I do not file and that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself." Do you remember that?

A. No, sir, I don't know that I can remember it that way. It might have been read that way to me, but I always had it in my head that it was to my own benefit and nobody else's; but I don't remember whether they read it or not.

Q. What was your intention at the time you signed this, as to what you would do with the land, if anything, when you got it?

A. I intended to convey it to that company, Williamson & Gesner.

Q. Did you have a talk with your wife before she filed?

A. Yes, sir, I talked with them.

Q. What did you tell her about it?

Mr. BENNETT: All this goes in subject to our general objection.

Q. I don't want anything unless it is what Biggs told you
266 to tell her. Did you tell her what Biggs told you about it?

A. Yes, sir; I told her what Biggs said; that is all I had to tell her about it.

Q. Did you tell her who told you?

A. Yes.

Q. You told her it was Biggs?

A. Yes, sir; she knew I went to see Biggs about it.

Q. Did you see her sign these two papers?

A. I don't remember whether I seen her sign them or not; I was in the room.

Q. In your opinion is that her handwriting?

A. I know that is her handwriting.

Mr. HENEY: We will offer these two papers in evidence. Received and marked Government's Exhibits "28" and "28A."

Q. Did you go over the section to any extent?

A. No, not to amount to anything; went across it.

Q. If you had been taking up a timber claim to hold or to sell for its timber, would you have taken this one?

Mr. BENNETT: I object to that as immaterial and incompetent.

Objection overruled. Defendants except.

Q. Do you think you would have taken it if you had looked it over again?

Objected to as immaterial and incompetent.
Objection overruled. Defendants except.

A. Well, I don't know whether I would or not. I don't think I would though, without I had had some backing.
Q. Who made that final proof did you?
A. Yes, sir.
Q. Did your wife and daughter make final proof?
A. No, sir.
Q. Did your daughter file at the same time you did?
267 A. Yes, sir; I think she did. I think my wife and me and my daughter filed.
Q. That is Mrs. Crane?
A. Yes, sir.
Q. Did you pay your own filing fees?
A. Yes, sir.
Q. For whom else did you pay the money?
A. I let them all have money to pay their filing fees, the whole five. I owed Crane and Gaylord for work. They was working for me and I paid them their wages that I owed them.
Q. Is that your signature?
A. Yes, sir; I think it is.
Q. Do you remember of making final proof?
A. Yes, sir.
Q. Before whom?
A. Mr. Biggs.
Q. Is that the paper you signed at that time?
A. I signed that. I don't know whether it is the same paper or not; I would have to read that over, but if they are final proof papers, that is my name, I signed that.

Mr. HENEY: We will offer this in evidence.
Mr. BENNETT: We object to that on the part of each of the defendants as being incompetent and immaterial and in no way binding up- either of the defendants, being an act and declaration of an outside party, made after the accomplishment of the act alleged to be the object of the conspiracy.
This objection was argued at length, and pending the argument the court took a recess until 2:00 o'clock P. M.
Upon the reconvening of the Court in the afternoon, the argument was resumed and continued at length, whereupon the Court overruled the objection and the papers was admitted. Defendant
268 excepts to the ruling.
The papers was thereupon admitted in evidence and marked Government's Exhibit "29."

Q. In connection with this paper which has been shown you, the final proof paper, there is a cross examination of the claimant in connection with the direct examination on Form 4-370, the original

being Form 4-370, which continues it. I will call your attention to that. Is that your signature on there?

A. Yes, sir.

Q. Do you remember of being questioned in regard to that? Take it and look at it?

A. Yes, sir, I remember it.

Q. That was before Mr. Biggs?

A. Yes, sir.

Mr. HENEY: We will offer that paper in evidence also.

The same is marked Government's Exhibit No. 30.

Mr. BENNETT: This all goes in subject to our objection and exception, your Honor.

The COURT: Yes.

Defendants except to the admission of the paper.

Mr. HENEY: The final proof paper is on a printed form, furnished by the Land Office, and I will read this in evidence, as follows:

269 4–379.

Timber and Stone Lands.

Testimony of Claimant.

JOHN S. WATKINS being called as a witness in support of his application to purchase the N.E. ¼ of Sec. 24, Township 15 South, of Range 19, East W. M. testifies as follows:

Question 1. What is your age, post office address and where do you reside?

Answer: 43. Prineville, Ore. Crook Co., Ore.

Ques. 2. Are you a native born citizen of the United States, and if so in what State or Territory were you born?

Ans. Yes, in Oregon.

Ques. 3. Are you the identical person who applied to purchase this land on the 21st day of July, 1902, and made the sworn statement assigned by law before the Register (or Receiver) or United States Commissioner, on that day?

Ans. Yes.

Ques. 4. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

Ans. Yes.

Ques. 5. When and in what manner was such inspection made?

Ans. In July, 1902, personal inspection.

Ques. 6. Is the land occupied; or are there any improvements on it not made for ditch or canal purposes, or which were not made by or do not belong to you?

Ans. No.

Ques. 7. Is the land fit for cultivation, or would it be fit for cultivation if the timber were removed?

Ans. No.

Ques. 8. What is the situation of this land, and what is the nature

of the soil, and what causes render the land unfit for cultivation?

270 Ans. Hilly, rough and rocky, and the soil is not fit for cultivation.

Ques. 9. Are there any salines, or indications of deposits of gold, silver, cinnabar, copper, or coal on this land? If so, state what they are, and whether the springs or mineral deposits are valuable?

Ans. No.

Ques. 10. Is the land more valuable for mineral or any other purposes, than for the timber and stone thereon, or is it chiefly valuable for timber or stone?

Ans. Timber.

Ques. 11. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. It is rough, hilly and rocky and is covered with ordinary good timber.

Ques. 12. What is the estimated market value of the timber standing upon this land?

Ans. About $800.00.

Ques. 13. Have you sold or transferred your claim to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract in any way or manner, with any person whomsoever, by which the title which you may acquire from the Government of the United States may inure, in whole or in part, to the benefit of any person except yourself?

Ans. No.

Ques. 14. Do you make this entry in good faith for the appropriation of the land exclusively to your own use and not for the use or benefit of any other person?

Ans. Yes.

Ques. 15. Has any other person than yourself, or has any firm, corporation or association any interest in this entry you are now making, or in the land, or in the timber thereon?

Ans. No.

JOHN S. WATKINS.

I hereby certify that the above named John S. Watkins
271 personally appeared before me; that I verily believe affiant to be the person he represents himself to be; and that each question and answer in the foregoing testimony was read to him in my presence before he signed his name thereto, and that the same was subscribed and sworn to before me at Prineville, Oregon, this 8th day of Dec. 1902.

M. R. BIGGS,
U. S. Commissioner for District of Oregon.

NOTE.—Every person swearing falsely to the above deposition is guilty of perjury and will be punished as provided by law for such offense. In addition thereto the money that may be paid for the lands is forfeited, and all conveyances of the land or of any right, title or claim thereto are absolutely null and void as against the United States.

I hereby certify that I have tested the accuracy of affiant's information and the *bona fides* of this entry by a close and sufficient oral cross examination of the claimant, and his witnesses, directed to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use and not for sale or speculation and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure in whole or in part to the benefit of any person or persons except himself, and am satisfied from such examination that the entry is made in good faith for entryman's own exclusive use and not for sale or speculation, nor in the interest nor for the benefit of any other person or persons, firm or corporation.

M. R. BIGGS,
U. S. Commissioner for District of Oregon.

272 Timber and Stone Lands.

Cross-examination of Claimant in Connection with Direct Examination.

On Form 4-370.

Before taking the testimony the Register and Receiver will read or cause to be read to the witness, Section 2392 of the Revised Statutes in regard to perjury—see bottom of page on Form 4-371—and see that witness understands same.

Question 1. Are you an actual *bona fide* citizen of this State? Yes.

Ques. 2. Are you married or single? Married.

Ques. —. Where did you reside prior to becoming a resident of this state, and what was your occupation? Born and raised in Oregon. Am a farmer.

Ques. 4. How long have you been an actual resident of this State, and where have you lived during all of this time? 43 years. Linn and Crook Counties.

Ques. 5. What has been your occupation during the past year, and where and by whom have you been employed and at what compensation? Farming for myself.

Ques. 6. How did you first learn about this particular tract of land and that it would be a good investment to buy it? In July, wanting to take timber went up in the timber and located this land.

Ques. 7. Did you pay or agree to pay anything for this information. If so, to whom and the amount? No.

Ques. 8. Have you made a personal examination of each smallest subdivision of said land? If so, state when and under what circumstances and with whom. Yes, in July with my wife and daughter, Wilford J. Crain and George M. Gaylord.

273 Ques. 9. How did you identify said land? Describe it fully. By Government corners as N.E. ¼ Sec. 24 Tp. 15 S. R. 19 E. W. M.

Ques. 10. How many thousand feet, board measure, of lumber did you estimate that there is on this entire tract, and what is the stumpage value of same? One and a half million feet, at 50 cts. per M.

Ques. 11. Are you a practical lumberman or woodman? If not, how did you arrive at your estimate of the quantity and value of the lumber on the land? I have worked a great deal in the woods.

Ques. 12. What do you expect to do with this land and lumber on it when you get title to it? I expect to use it the best I can.

Ques. 13. Do you know of any capitalist or company which is offering to purchase timber land in the vicinity of this entry? If so, who are they and how did you know of them? No.

Ques. 14. Has any person offered to purchase this land after you acquire title? If so, who and for what amount? No.

Ques. 15. Where is the nearest and best market for the timber on this land at the present time? Prineville, Oregon.

Ques. 16. Did you pay out of your individual funds, all the expenses in connection with making this filing and do you expect to pay for the land with your own money? Yes.

Ques. 17. Where did you get the money with which to pay for this land and how long have you had same in your actual possession? Made it out of my hay crop of this year; had it about two months.

Ques. 18. Have you kept a bank account during the past six months, and if so, where? No.

In addition to the foregoing the officer before whom the proof is made will ask such question- as seem necessary to bring out all the facts in the case.

JOHN S. WATKINS.

274 Q. Were any other questions asked you than those printed here, do you remember, by Mr. Biggs?

A. No, sir, not that I remember of; I don't remember of any.

Q. Did he read or explain to you any law in regard to perjury, or the Statute referred to here, Section 2392 of the Revised Statutes of the United States?

A. Not that I heard.

Q. Did he make any suggestion at all or any remarks when you made the answer to this question, "Do you know of any capitalist or company which is offering to purchase timber land in the vicinity of this entry; if so who are they and how did you know of them?" your answer being "No."

A. I don't know as I did that particular question. I asked him how a man could answer them, and he said they was all answering them.

Q. He said the others was?

A. Yes, sir; he said they was all answering the questions that way.

Q. You did furnish your own money to make the final proof with?

A. Yes, sir.

Q. And afterwards, did you secure the money or borrow the money from any person?

A. I borrowed it from Mr. Gesner.

Q. About how long after making final proof?

A. I think it was about eight or ten months, as well as I remember, something like that.

Q. The money you paid into the Land Office was returned to you, was it not?

A. Yes, sir.

Q. Is that the check returning it?

A. That is it.

Q. Is that your signature on the back of it?

275 A. Yes, sir.

Q. What did you do with it after you got it?

A. I give it to Mr. Gesner. I suppose it was that I gave him the money right away. I think I cashed that check at the Prineville Bank, if I remember right. I rather think it was the same day I paid Mr. Gesner off a note and mortgage he had against me.

Q. A note and mortgage against you?

A. Yes, on this timber claim. I gave Mr. Gesner a note and mortgage on that timber claim when I borrowed that $400 from him.

Mr. HENEY: We will offer this check in evidence. The same is received and marked Government's Exhibit "31."

Q. At the time you made final proof, did your wife make final proof?

A. No, sir.

Q. Why did she not make final proof when you did?

A. Mr. Gesner said he wanted them to relinquish, all but me.

Q. Did he state any reason?

A. Yes, sir; he said he did not want too many in one family to file on the land, and he did not want anybody but what was able to pay for it.

Q. Did he say why?

A. He might get into trouble with the Government.

Q. Did you see her sign that relinquishment?

A. No, I don't remember of seeing her sign it.

Q. Is that her signature?

A. Yes, sir; that is her signature.

Mr. HENEY: We will offer this in evidence.

Same is received and marked Government's Exhibit "32."

Q. Did you estimate the amount of timber; it says one million and a half feet on that claim.

A. No, I did not all over the section. I did one quarter

276 of it I guess, made a rough guess at it as I came through; maybe two quarters, made a rough guess at it, but not all over, I don't know what it would have gone all over.

Q. Do you think it would go that much?
A. Yes, I believe it would do it.
Q. Was there any market for that timber there at that time?
A. No, sir; none that I knowed of.
Q. Now, during this first talk you had with Mr. Biggs about filing on the claim, was anything said by either of you in regard to how much your profit would be in the matter?
A. Yes, Mr. Biggs figured up what would be coming to us apiece.
Q. Do you remember how much he figured it?
A. It was something between $73 and $74; it wasn't quite $75.
Q. Do you remember what items he put in?
A. I don't know. I told him I wanted him to figure it up from start to finish to the time I made the filing until it was over. I don't know what he charged each one, or what all he counted. That is about what he figured it would take.

Cross-examination by Mr. BENNETT:

Q. That is, provided you sold Gesner for $500, it would be that much.
A. Yes, sir.
Q. You expected to get a whole lot more than that out of it, didn't you?
A. No, I don't know as I did.
Q. Didn't you expect to get $600 or $800 for the claim?
A. No, I did not.
Q. What say?
A. No, I didn't expect to get it.
Q. Didn't you expect to get a good deal more than $500?
A. How is that?
277 Q. Didn't you expect to get a good deal more than $500?
A. I thought at times I might, but I really did not expect to do it. I expected to sell it to them for that $500. That is what I calculated to do.
Q. You said you thought at times you might get more?
A. Yes, I had them thoughts at times, that I might.
Q. Didn't you hold it for more?
A. No, I can't say that I did.
Q. Didn't you testify at the first trial of this case, Mr. Watkins, in answer to the question, "As a matter of fact, you held the land at a whole lot more than you had any idea they would give you for it, didn't you? You held it at a $1,000, didn't you?" And did you answer, "Yes, I calculated to ask him $800 or a $1000 for it when the time came to sell it to him."
A. I think I did, but I done it to favor them men.
Q. Done it to favor what men?
A. These men indicated here. I didn't want to swear a straight lie, but I did all I could without it.
Q. Do you mean to say that at the other trial of this case you swore to a lie to favor them?
A. I don't think it is hardly a lie. I might have calculated on

that date but that was not the understanding and that is not what I would have done with it.

Q. Was this true or false? You say you did testify that? Was it true or false that you contemplated asking him $800 or $1000 for it when the time came to sell it?

A. Well, I don't know as it was true, and it was not false; I thought of doing that after I made final proof. I never thought of it before.

Q. You thought of doing that after you made final proof?

A. Yes.

278 Q. And you say now you testified in that way at the other trial in order to favor the defendants?

A. Yes.

Q. And not to tell the truth?

A. If I testified to do that, I don't know whether I testified to do it before I made final proof.

Q. Well, you know whether you testified to it to favor them or not, don't you, Mr. Watkins?

A. Yes, sir, I done it to favor them.

Q. You done it to favor them?

A. Yes, sir.

Q. You do remember then that you so testified?

A. Well I think I did; I aimed to do that. I don't remember what I testified to, but after I made final proof, I intended to turn it over to them just as I agreed to do. I don't know what I testified to exactly; I dont' remember.

Q. Did you testify at the other trial in answer to the question "And if they would give you as much as anybody else, you would give them the advantage? If they would give you just as much as anybody else, you would let them have it? That was your intention?" And did you answer that, "Yes."

A. I think I did.

Q. And in answer to the question, "And if they would not, you would let somebody else have it?" And did you answer, "Yes, or that I was free to do that." I don't remember what I answered.

Q. You don't remember whether you answered that way or not? I suppose you claim that if you did answer that way, you answered to favor the defendants?

A. That is what I did.

Q. And not because it was true. And immediately afterwards the question being asked you, "And that was the intention, was it

279 not?" and did you answer, "Yes, sir, that was my intention."

A. My intention was not to let them have it for less than that, do you mean, or for $500?

Q. I will read all over to you together, and then we will understand it better perhaps.

A. All right.

Q. The question being asked you, "And if they would give you as much as anybody else, you would give them the advantage. If they would give you just as much as anybody else, you would let

them have it? That was your intention. A. Yes sir. Q. And if they would not, you would let somebody else have it. A. Yes sir, or that I was free to do that. Q. And that was the intention, was it not?" And did you answer, "Yes, that was my intention."

A. I guess I did.

Q. Now you say that was false?

A. No, I don't consider it was false. I did have them thoughts about it after I made final proof.

Q. After you made final proof?

A. Yes; but I don't know that I would have done it.

Q. What say?

A. I don't know that I would have done it. I just simply thought of things like that.

Q. You simply thought of things like that?

A. Yes sir..

Q. You testified in the other trial that you had an arrangement, a talk with Biggs, about trying to sell the land to other parties after the patent was held up, didn't you?

A. Yes, but that was after Gesner—I didn't have a talk with Biggs myself. I heard him have it with Harry Hutchinson; but that was after Gesner had said he would not take the land.

Q. What say?

280 A. I heard Biggs have the talk with Harry Hudson in regard to that, but that was after Gesner refused to take the land, and said he didn't want it.

Q. Oh, the talk was with Harry Hudson; Biggs was trying to work for Harry Hudson.

A. For all of us, he said.

Q. Did you also in the first trial testify in answer to the question, "As a matter of fact, you say you intended at that time to let Gesner have it. Suppose somebody else had come along and offered you more for it than Gesner would give for it; you would have felt perfectly free to sell it to the other person, wouldn't you? "Yes, sir, I felt like I could do it at that time."

Did you so testify?

A. I don't recollect saying that. There was something like that said, that there was an understanding that it would go to them.

Q. What say?

A. I think that I went on to say that there was an understanding that the land was to go to them. I would not have felt perfectly free to do it.

Q. Then you did not answer this question in the way I have indicated?

A. Not that I remember of, I did not.

Q. Did you immediately afterwards and in that connection, the question being asked you, "As a matter of fact, you held the land at a whole lot more than you had any idea they would give you for it. Didn't you hold it at $1000?" Didn't you answer, "Yes, I calculated to ask him $800 or a $1000 for it when the time came to sell it to him. Q. And if they would not give it, you would not

give it to him? A. If I could get that, I didn't aim to, and still I felt if I could not get that, or do any better than that myself, I would fall back on them, and sell it to them."

281 A. Yes sir.

Q. You so testified did you?

A. Yes, sir.

Q. What do you say now as to whether that was true or false?

A. That was after I had made final proof; I did figure on that.

Q. But that was after you had made final proof?

A. Yes, I did think about doing that, but I might not have done it.

Q. What say?

A. I did figure on that, but I might not have done it when it came to a show down.

Q. You didn't know exactly what you would do when it came to a show down?

A. No.

Q. Now, Mr. Watkins, have you been threatened with indictment if you did not change your testimony?

A. No, I have not been threatened with indictment. Mr. Heney said to me before the grand jury would be in session afterwards.

Q. What say?

A. Mr. Heney said to me before the grand jury, if the truth was not told in the matter, that the grand jury would still be in session. I don't know what he meant. I think that is what he said.

Q. Didn't you understand he was threatening to indict you if you did not tell what he considered was the truth?

A. No, I didn't consider it that way.

Q. Now, on the 8th of this month, between 12 and 1 o'clock, in front of the court house, did you say to S. E. Starr that you were going to change your testimony; that you hated to, but you had to for you were afraid they would indict you, or words to that effect.

A. Yes, sir.

Q. You did.

A. But nothing they said to me caused me to do it.

Q. What say?

A. Nothing they said to me caused me to think it, though.

282 Q. Nothing they said to you?

A. No, because I know I had crowded things around to help these fellows out, and they knowed it, and these people knowed it.

Q. It was not a statement Mr. Heney had made to you?

A. No, I don't know as I had been before the grand jury either, no, it was not that. I thought it before I came here.

Q. You thought it before you came here?

A. Yes sir.

Q. Now, did you also tell Doug. Lawson in the presence of Green Beard and Henry Beard that you were going to swear there was a contract to save yourself from indictment; that you did not think there was any contract, but you were going to swear there was to save yourself from indictment.

A. No.

Q. That being about on the 23rd or the 24th of August, about 10 o'clock, at the Albany room?

A. That I knowed there was no contract? That I was going to swear there wasn't one?

Q. That you were going to swear there was a contract to save yourself from indictment; that you did not think there was any contract, but that you were going to swear that there was to save yourself from indictment?

A. I don't remember anything of the kind. I never swore yet there was any contract.

Q. What say?

A. I never swore yet there was any contract.

Q. You haven't sworn there was any contract?

A. I don't know what it takes to make a contract. There was a fair and square understanding about, but I don't know whether it is a contract or not. I don't know what it takes to make a contract—a verbal contract.

283 Q. You don't know what it takes to make a contract?

A. No, not a verbal contract, I don't.

Q. Well, did you tell him that you were going to swear that there was a contract to save yourself from indictment? That you didn't think there was any contract?

A. I don't remember anything of the kind.

Q. You don't remember whether you did or not?

A. No, I have no recollection of it, if I did.

Q. But you admit you told S. E. Starr that you were going to change your testimony to save yourself from indictment?

A. I don't know whether I said it that way or not, but I gave him to understand that I was not going to testify exactly as I did before in regard to this selling it to whomever I pleased.

Q. And that you were going to do it to save yourself from indictment?

A. I don't know whether I said that or not, I don't remember.

Q. You don't remember whether you said that or not?

A. No.

Q. Did you say anything about an indictment of yourself in conversation with Starr?

A. I said I thought a man would get into trouble over it, I think: I believe I said that.

Q. When you testified at the first trial, you didn't say a word about Biggs telling you that you could have a- understanding about the land, did you?

A. I don't remember whether I did or not.

Q. Is not this what you stated at that time, the question being by Mr. Heney: "He said Williamson and Gesner wanted people to file on timber claims in that country east of Prineville about 25 miles and they would furnish them money to file on it, to prove up on, and when they got the patent from the government, they would give them $500 for it. What did you say to him? A. I told
284 him I would see about it."

Is not that what you testified and all you testified in that connection in relation to that matter at the first trial?

A. I don't remember. I think we had that kind of talk all right, but I don't know what I testified to, I don't remember. I did not go very much on it, and I told him I would see about it later on.

Q. Now then, at the time you went up to get a claim, when you saw Mr. Gesner and Mr. Williamson up there and got the numbers of this land, you say Mr. Williamson put the numbers in the book?

A. Yes, sir.

Q. How did he come to do that?

A. I don't remember exactly how he did come to do it.

Q. Was there any talk between him and Gesner about that?

A. I don't remember.

Q. Was not Gesner about to put the numbers down in the book and was not there some talk about Gesner's bad writing?

A. I don't remember whether he was going to put the numbers down or not, but I remember something about that talk.

Q. You do remember something about that talk?

A. Yes, Mr. Williamson kind of made fun of his writing, said the man couldn't read it when it got cold, or something to that effect.

Q. Made fun of Dr. Gesner's writing?

A. Yes, I remember that talk, but I don't remember how it came up. I was not very well then and I don't remember things as well as I ought to.

Q. Did not Williamson say in that joshing talk that "you had better let me write the numbers down, because they can't read it if you write it?"

A. Yes, it was something to that effect, but I don't know how it came up.

Q. You still remember that, do you?

A. I remember something about it.

285 Q. You wasn't swearing to that to help anybody out when you swore to that on the other trial?

A. I remember that is correct.

Q. You say you paid the filing fee for yourself and those other men?

A. Yes, I did; that is, I paid them; I owed them their money.

Q. That is, you furnished the money?

A. I furnished the money, yes.

Q. And Dr. Gesner didn't have anything to do with that?

A. No sir.

Q. Do you claim now to have had any talk with Dr. Gesner up there at the shearing plant about furnishing money?

A. No.

Q. None whatever?

A. No.

Q. And you did not hear any with any up there?

A. I never heard anything about money or buying or selling there.

Q. Nothing was said up there about buying or selling?

A. Not that I heard.

Q. Nor that you said?

A. No sir.

Q. You still say that?

A. Yes, sir.

Q. You did not make any arrangement with Dr. Gesner about that up there at all?

A. No sir.

Q. You never did, did you?

A. No, I never spoke to him before I filed on it.

Q. Never spoke to him anything about that?

A. No.

Q. You never had any arrangement with him and you were putting up your own money, and you expected to put up the money for those other men, didn't you, your son-in-law and Gaylord
286 as well as your wife?

A. For filing fees, you mean?

Q. Yes.

A. Yes. I did.

Q. Did you expect to help him to get the money to pay up on the land?

A. Yes, I calculated to do that too.

Q. You still say that is the truth, do you?

A. Yes.

Q. Mr. Watkins, at the time you made these sworn statements that were offered in evidence here, did you believe them to be true?

A. You mean the first ones?

Q. Yes.

A. Well, I didn't realize there was anything wrong about them: I did not investigate it enough to know.

Q. Did you believe them to be true?

A. What I said?

Q. Yes.

A. No, I don't know as I did.

Q. What you swore to there?

A. I never stopped to realize about it; I thought it was all right, and Biggs told me I was making no contract, that it was simply an understanding.

Q. Well, you did not have any understanding; you had not had any talk with Gesner at all, had you?

A. No, but what talk I had with Mr. Biggs and their connections with the matter made me know there was something in it.

Q. Oh, you had an idea that you were expected to convey?

A. Yes, sir.

Q. But you hadn't had any arrangement with Gesner about that at all?

A. Nothing, only from others, no sir. I never had spoke to
287 Gasner until that time about it.

Q. You testified at the first trial that you believed those statements to be true, didn't you, when you made them?

A. I don't know what I testified to.

Q. Biggs told you, if you had made any contract to sell the land, you could not sign the affidavit, didn't he?

A. Yes.

Q. Did he?

A. Yes, sir.

Q. When was it Biggs told you that?

A. I think he told me twice; I think he told me the first time I ever talked to him about it, and he told me when I went up in the timber. He said, if I hadn't made any contract with Dr. Gesner it would simply be an understanding.

Q. And he told you that you could not make any contract and then sign the affidavit properly, didn't he?

A. That is what he did. He said I could not contract to sell the land before I proved up on it.

Q. Yes, you could not contract to sell the land before you proved up on it. That was the first talk he had with you?

A. I believe he told me that then, and I think he told me before I went up in the timber too.

Q. He told you two different times?

A. I think so. He told me I was making no contract; it would just simply be an understanding between us that I was to convey the land when I got the patent to it.

—. ——.

A. I don't remember whether I did or not.

Q. Did not Mr. Heney tell you in his office that he was a bad man and to be feared, during the last trial of the case?

A. I don't know as he said he was a bad man. He took me up to his office, and he said he expected the truth out of the witnesses. He said he was a man to be feared.

288 Q. Said he was a man to be feared?

A. Yes, they had better tell the truth about it.

Q. Said he was a man to be feared and they better tell the truth about it. Didn't he tell you he was a bad man in the same conversation?

A. No, I don't think he said that; I think he meant he was a man to be feared of the law.

Q. What say?

A. I think he meant he was a man to be feared by the law business.

Q. You think he meant he was a man to be feared by the law breakers?

A. No.

Q. Oh, to be feared in the law business?

A. Yes. I thought he was throwing hints to me to tell it as it was. That is what I thought.

Redirect examination:

Q. Before that talk, Mr. Watkins, and after you had testified in the first trial, do you remember meeting Mr. Burns and myself on Morrison street up here, in front of a saloon you had just come out of?

A. Yes.

Q. What did you tell me in regard to your testimony at that time?

Objected to as incompetent and self serving.

Question withdrawn.

Q. At the time I spoke to you in my office that you are refer-ing to, is not this the conversation that took place. You had already testified then at the second trial, hadn't you?

A. When you talked up there?

Q. Yes.

A. I can't remember certain whether I had testified. I believe it was afterwards.

289 Q. After you had testified in the second trial?

A. I believe so.

Q. Didn't I say to you, now, Mr. Watkins, you know that during the first trial, after you had testified, you met Mr. Burns and myself up the street here, and told me that Biggs had lied on the stand, and that you had done everything in your power to favor the defendants, and had colored your testimony that way, and that we knew it perfectly well, as well as they did; and then didn't I say, "Now, patience may cease to be a virtue."

Objected to as incompetent and leading.

Objection overruled. Defendants except.

A. I think that is about what you said.

Q. You were called before the grand jury about another matter than this particular thing that is involved in this trial, were you not?

A. On some other matter?

Q. On another matter than is involved in this trial, a matter you were called before the grand jury this last time in regard to?

A. Yes, I think I know what you mean.

Q. You were not questioned about your evidence in this case, were you, before the grand jury, this last time?

A. About this case?

Q. Yes. I mean about your testimony in this case?

A. No. There was nothing said, you mean, what I had already testified to?

Q. Yes.

A. No, there wasn't anything said about it.

Q. It was about another matter connected with this case, but another matter?

A. I don't exactly understand you.

Q. The point I am trying to make is, that when you were before the grand jury this last time, it had nothing to do with what

290 you had testified to yourself in the former two trials of this case?

A. No, there was nothing said about it.

Q. Now, upon the first trial of this case, didn't you testify as follows in regard to the point that Mr. Bennett questioned you about in your direct examination: "Q. Did you have any talk with Biggs about the filing fees? A. Yes. Q. What was it? A. I told him I was going to furnish my own money to file on. Q. Anything else? A. And I asked him if he thought that would be binding me in a contract with him in any way that I would not have to swear hard to get through with it. He said it would not: he didn't think it

would bind me at all, if I furnished my own money to pay through. I would be under no contract with them parties. Q. Did you intend to convey it to them at the time you were making the filing? A. Yes, sir."

Do you remember so testifying?

A. Well, that sounds natural to me that way. But that is not the questions he was asking me, is it?

Q. But do you remember so testifying on the first trial?

A. Yes, sir, I remember that; I remember having that talk with Biggs.

Q. Do you remember testifying this way also on the first trial, the questions being by Mr. Bennett: "Q. Now, Mr. Watkins, you say that when you went before Biggs to make this application, you asked Mr. Biggs whether you could lawfully make the affidavit or not. A. Yes, sir. Q. And he asked you whether you had made any contract for the sale of the land. A. I don't think he did. Q. Didn't he tell you that if you had made any contract you could not make it? If you had any contract for the sale of the land, you could not sign the affidavit. A. Yes, he didn't say it in them words exactly; he said I could make no contract before I had proved up on the land. He told me that, sir. Q. And you told him you
291 hadn't made any contract. A. I told him I hadn't any further than I had with him. That is, our talk was as far as it had ever been. Q. And he told you that was no contract? A. Yes. Q. He told you that was no contract? A. Yes. Q. He told you that you were under no obligations to sell to Gesner, if you could get more, or if you didn't want to sell to him, didn't he. A. I don't know that he said that, I don't think he did."

Do you remember of so testifying?

A. I remember that. I don't remember of testifying to it but I remember the talk away back.

Q. Didn't you also testify in this way: didn't Mr. Bennett ask you, "Q. And if they would give you as much as anybody else, you would give them the advantage? You would let them have it; that was your intention? A. Yes, sir. Q. But if they would not, you would let somebody else have it? A. Yes, and that I was free to do that. Q. And that was your intention as a matter of fact, wasn't it? A. That was my intention. Q. And you explained that to Mr. Biggs, didn't you, practically? A. Yes, sir, we talked of it. Q. And he told you there would be no breach of the law under those circumstances. A. I don't know as I told Mr. Biggs that either. Q. You don't know whether you did or not. A. I don't think I told Mr. Biggs that now. Q. You told him that didn't you? A. I asked him if I could make that oath that was before me legally; that is, without swearing to anything that was wrong, and he said he would not. Q. Didn't you tell him something about the facts? A. I never told him anything about it because we had talked between ourselves. Q. And you believed it was all right when you signed it? A. Yes, I did."

Do you remember so testifying?

A. Yes, I remember that.

Q. But as a matter of fact at that time that you filed what
292 was your intention as to what you would do with the land when you got the title?

A. What was my intention then?

Q. Yes, at the time of filing?

A. It was my intention to convey it to that company. That was my intention.

Q. What was your understanding as to whether you had agreed with Biggs that you would do it or not?

A. I understood I had agreed to do it, with him.

Q. When was it Biggs talked about finding some other purchaser for the land? How long was that after you took back that check from the Land Office?

A. I don't know how long it was, but it was after Gesner had suit and said he didn't want nothing to do with it and wrote me a letter to relinquish and have nothing to do with it.

Q. That was after you got that mortgage back?

A. Yes, quite a while. He was talking to Harry Hutchinson on the corner of Wurtzweiler's at the time I talked with him, all the talk I ever had with him about it.

Q. Was it before or after the grand jury took up this matter?

A. I think it was before; I don't know. It was in the summer or fall. It was before, because it was not this last summer and the grand jury took it up in February, didn't it?

Q. Yes.

A. It was in the fall or summer before.

Q. Was it before or after you had heard about the Puter indictment. You heard about that, didn't you?

A. Yes, I guess I did, but I don't remember.

Q. When the check came back to you, didn't you get a letter similar to that with it (showing the witness a paper)?

A. I don't know as I could——

293 Q. Look that over and perhaps it will refresh your memory.

A. Yes, I got a letter like this from the Land Office when my check came back.

Mr. HENEY: If there are no objections, I will introduce this letter now, and prove that it was returned to Henry Beard later on.

The letter was admitted without objection to the order of proof and marked "Exhibit 33" and read as follows:

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
THE DALLES, OREGON, *December* 5, 1903.

H. E. Beard, Prineville, Oregon.

DEAR SIR: Enclosed you will find voucher for $410.00 due you on account of deposit made for timber and stone proof. Suspended.

The return of this money is authorized by the General Land Office, and in no wise jeopardizes your right to the land if your

good faith and full compliance with the law are shown on examination of proof. You will be notified promptly when final decision is rendered in Washington, D. C., and can forward the money to me if patent is to issue.

Please sign voucher and return and a check for the amount will be sent you.

Yours respectfully, ANNE E. LANG,
F. S. F., *Receiver.*

294 Q. Have you obtained your patent yet?
A. No, sir.
Q. Had any notice in regard to paying the money?
A. No.
Q. At the time your wife relinquished, or about that time, did you receive any word from Dr. Gesner by letter?
A. No, I didn't get no letter from him them.
—. This letter was after they had relinquished and before you had made final proof, or afterwards?
A. After I had made final proof, I think.
Q. You got a letter from Dr. Gesner?
A. Yes.
Q. What did you do with it?
A. I destroyed it.
Q. What was the substance of it?
A. It was that I had better relinquish my claim; that we would get into trouble over the Government, he was afraid if we went ahead any further.
Q. Which Starr was it that counsel questioned you about having the conversation with?
A. The old gentleman Starr.
Q. The father of Ernest Starr?
A. Yes.
Q. Do you know what relation he is to Mr. Williamson?
A. I have heard he was a brother-in-law, I think, I think he told me he was that day.
Q. Did you go and look at the corner of the claim you filed on to see whether that was the corner they had told you it was—the marks on it?
A. I think we did. I am not certain, but I think we drove up to it, and I believe the boys looked at it; but I am not certain of it now.

295 Recross-examination:

Q. Did you get the numbers up there?
A. Yes.
Q. And brought them down with you to Prineville?
A. I got the numbers in the timber, yes, and took them to Prineville.
Q. You got the numbers in the timber for what land?
A. Section 24, Township 15, Range 19.
Q. And also for the land that Gaylord took?

A. Yes, sir; that was put in my book too.

Q. Now, in connection with what Mr. Heney asked you about testifying on the other trial, after the question, "And you answered, "yes, I did," you were asked this question: "You believed what you said in your affidavit there to be true? A. Yes, I did."

Did you so testify?

A. I think I did.

Q. In answer to the question, "You would not have signed it otherwise," you answered, "No, I would not have sworn to a lie, or have my wife for $75."

A. I did.

Q. You so testified, did you?

A. Yes, sir.

Q. What do you say now? Do you say now you would have sworn to a lie and had your wife, for $75?

A. No, I would not. If I had thought there was any lie about it I would not have had anything to do with it. I knowed it was not exactly straight, but I didn't think a man was swearing to a lie—everybody was doing that, as Mr. Biggs said, and there was nothing particularly wrong about it.

Q. Did you understand that it was not straight and yet was not a lie?

296 A. I didn't think it was exactly according to law.

Q. And yet you didn't think it was a lie?

A. Yes, I didn't think I was swearing to any lie about it, I didn't realize it.

Q. Didn't realize it.

A. No, I didn't.

Q. As a matter of fact, you was not swearing to any lie about it, was you?

A. I don't know whether I was or not. It looks kind of like it now to me.

Q. What?

A. It looks kind of like it to me now.

Q. You think you were, now?

A. It looks kind of like I was.

Q. When did you begin to think you was swearing to a lie?

A. When this thing begin to investigate.

Q. Since you have been down here to this trial?

A. No.

Redirect examination:

Q. When was it you first thought about it?

A. When they first commenced investigating the thing last February; since that. I never paid much attention to it before. When I made the filing I did not. I was busy with my other work, and I didn't particularly care much of anything about it. In fact, I didn't want to go into it very much; the other people there wanted to go worse than I did. I never particularly wanted to have anything to do with it from the start.

Q. Now, at the time you made your final proof, what was your

intention as to what you would do with the land when you got the title?

A. Well, I didn't know then whether I would let them have it or not. I didn't know but what if the creek ran through it so
297 there was water in it, I would fence it up and use it for a pasture myself if they didn't give me the price for it, because I had paid my own money for it; they had cut out three of us, and I didn't know as I was under a contract very much with them.

Q. You commenced to think you were not getting a square deal anymore?

A. Yes, I began to think that way.

Recross-examination:

Q. Because they would not give your wife and your son and son-in-law the money so they could swear to a lie as you say, you thought you were not getting a square deal?

A. I wasn't figuring on no lie at that time.

Q. You hadn't begun to think about there being a lie about this, until about Febreary?

A. No, not until they begin to investigate I didn't.

Q. When you were proving up, you didn't think there was any lie then?

A. I thought if I furnished my own money—I knowed there was a lie there, if a man didn't get out of it in them final proof papers; I could see them plain enough.

Q. What is that?

A. I could see there was a lie in them final proof papers.

Q. Yet you made it?

A. Yes, but I was paying my own money.

Q. You meant you did not swear to a lie when you made your final proof papers?

A. No, I didn't think I was. I thought furnishing my own money put me out of it.

Q. You thought the statements made in the final proof papers were true then?

A. Yes, sir; I thought they was all right.

298 Redirect examination:

Q. Did you think this one was all right: "Q. Do you know of any capitalist or company which is offering to purchase timber land in the vicinity of this entry; if so who are they and how did you know them? A. No. Q. Has any person offered to purchase this land after you acquired title; if so for what amount? A. No."

A. Those are the questions I asked Biggs about, how to answer them, and he said they was all answering them.

Excused.

299 JOHN F. WATKINS, recalled, on part of the Government for further cross examination.

By Mr. BENNETT:

Q. Mr. Watkins do you know Geo. Barnes, attorney in Prineville?
A. Yes.
Q. Did you have a conversation with him about the sixteen or seventeen of August up where they were building the new bank building in Prineville, you and him sitting on a stone that had been cut out for the building?
A. No, I don't know that I had without I heard the conversation: I might remember it.
Q. Just a short time before you came down here to testify before the Grand Jury at this term of court after the second trial?
A. I can't call it to memory, no.
Q. Do you remember of seeing him there?
A. Yes, I remember of seeing him before I came down.
Q. Do you remember you and him sitting on a rock there, one of the stone- that had been cut out?
A. No, I can't remember it.
Q. Did you on the 16 or 17th of August, right in front of where they were building in Prineville—you know where that is, do you?
A. Yes.
Q. You and George Barnes alone being immediately present, sitting on a stone or rock which had been cut out, did you bring up the subject of these cases yourself, and complain about having to come down here, and say that you had lost a whole summer's work being dragged back and forth and that Henry Gray and Dick Reese were the sons of bitches that started it, and that you were going before the Grand Jury when you came down and you would go
300 before the Grand Jury against them for fencing Government land, and wanted to know if Barnes, when he came down, would not go with you before the grand jury, and did Barnes say in answer to that, yes, if he could do any good, but personally, he didn't know anything about it; and did you say then, "This whole case is spite work on their part, for I know that old Doc never made a contract or had any understanding for the sale of this land, for I came as near having an understanding about selling to Doc as anyone, and I never made any contract or had any understanding as to who I was going to sell to."
A. I don't remember having any such talk with him. I remember talking with him somewhere about that government land being fenced up.
Q. There in front of the bank building?
A. It seems to me like we were standing up further on the corner by O'Rourke's saloon. I spoke to him about that government land; but this other talk I don't have any recollection of at all. I don't remember sitting on a stone, and don't remember having that kind of talk with him.
Q. Do you say that you did or did not, or do you simply not remember whether you did or not?

A. Well, sir, so far as the contract business, telling him that, I didn't say that to anybody, I don't think.
Q. You say you did not say that to him?
A. No.

Redirect examination.

By Mr. HENEY:

Q. Did you ever hear of Graves's name in connection with this matter until the second trial, when I forced Gesner and Williamson on the stand to tell the name of the man they had stated in the first trial without giving any name, was the actual man who had threatened them?

301 Mr. BENNETT: That is objected to as incompetent and immaterial.
Objection overruled. Defendants except.

A. What was the question?
Q. Was not the first time you ever heard of Graves' name in connection with this case, at the second trial of the case, when in answer to the question from me to Mr. Williamson, asking him the name of the actual man who he said had threatened him, without mentioning the name, he wanted to know if I really wanted to know the name, and I said, yes, and he told me Graves. Is not that the first time you heard Graves' name in this connection?
A. Only supposition; I heard it talked of among us witnesses that we thought Henry Graves and Dick Reese sprung it a long time ago. I heard Henry Hudson talk that, and that is the only time I ever heard it to be positive about it.
Q. You never knew Graves being a witness in any way for the government?

Same objection.
Overruled; defendants except.

A. I know of his being subpœnaed here, but I never knowed of his testifying as a witness.

Excused.

Government rests.

302 JOHN N. WATKINS, recalled on part of the government, testified.

Direct examination.

By Mr. HENEY:

Q. Mr. Watkins, where do you live from Prineville?
A. I live a mile and a half east.
Q. When did you leave home to come to the trial of this case?
A. The morning of the 16th of August.
Q. How early in the morning?

A. 8 o'clock, I think.
Q. How did you come?
A. I came across the mountains on the Santa Ana wagon road.
Q. What sort of a conveyance?
A. A buckboard and two horses.
Q. Your own conveyance?
A. Yes, sir.
Q. Did you go into Prineville?
A. Yes, sir, I went through Prineville.
Q. Did you stop and talk to any one there?
A. No, sir.
Q. Did you stop at the store for anything?
A. Yes, I stopped at the store and bought a sack of oats, but I did not get out of the wagon; did not talk to anybody only the clerk I got the oats from.
Q. Did you pay for the oats or have them charged?
A. I had them charged.
Q. And from there how did you go?
A. I came to Sisters that day, that was Wednesday; and Thursday I came to Fish Lake, and on Friday I came to Lower Soda, and on Saturday I came above Lebanon about 10 miles, and on Sunday I staid at my father-in-law's and on Monday morning I took
303 the train for Portland, and that was the 21st.
Q. Who if any one was with you?
A. My son-in-law and his wife and my wife and daughter, that is, across the mountains and above Lebanon and from there on, my son-in-law Crain was with me and George Gaylord.
Q. Who left home with you?
A. From over at Prineville?
Q. Yes.
A. Me and my wife and son-in-law and his wife and my little girl.
Q. Is that Wilford Crain?
A. Yes, sir.
Q. Did you have any talk with George Barnes along the 16th and 17th?
A. I never saw him at all or had any talk with him whatever. I never saw him and never spoke to anybody only Wurtweilers, there, where I got the oats.

Cross examination.

By Mr. BENNETT:

Q. What day did you say it was when you started down here?
A. It was Wednesday.
Q. What day of the month?
A. The 16th.
Q. What time in the day.
A. I left home about 8 o'clock, as well as I remember, it might

have been a little after 8, I think it was about 8; it was about 9 when I passed through the town.

Q. Were you in Prineville the day before that?

A. On Tuesday? I think I was, I believe I was; I am not certain.

Q. Did you see George Barnes on that day?

A. I don't remember of seeing him, no. I might have seen him, though, but I don't remember it now.

Q. Didn't you see — just a short time before you came down here?

304 A. I saw him pretty near every time I was in town.

Q. Didn't you testify when you were here in court before in this trial, not on the other trials, but in this trial, before this jury, that you saw him just a short time before you came down?

A. I think I did, yes.

Q. And that you remembered having a talk with him about fencing the government land?

A. Yes, I had that talk with him.

Q. But that you don't remember where it was?

A. No, I am not certain where it was. I think, though, it was up about Rowart's saloon.

Q. You don't think it was in front of the bank building?

A. No, I don't think I ever had any talk with him there at all, sitting on a rock at all; I know in fact, that I did not.

Q. Were you drinking those days?

A. I might have been drinking some, yes.

Q. And had drank a good deal?

A. Oh, I drink occasionally.

Q. Were you drunk on the day you started down here, intoxicated?

A. No, sir.

Q. Or the day before?

A. I might have been drinking a little beer the day before; when I go to town lots of times I drink beer, and that day I might have been.

Q. Were you pretty well intoxicated?

A. I was able to go about my business and attend to it.

Redirect examination:

Q. Was George Barnes drunk on the day you saw him?

A. Yes, sir; he could hardly walk. I treated him three or four times in that saloon of Rowart's.

(Cross:)

Q. Which was the drunkest, you or him?

305 A. I think he was the drunkest. I might have been mistaken.

Q. Then he might think you were the drunkest?

A. Yes. I paid for the whiskey at least, all that we drank.

Excused.

306 Joel Calavan being afterwards called as a witness for the Government and having testified that defendant Biggs spoke to him about the matter of his taking a timber claim and told him that if he and his wife wanted to take a claim Mr. Gesner would locate him and give him $500 for his claim when the patent issued, and that the witness asked him if they could do that kind of business,—if it would be legal, and Biggs told him that he could not make any contract, but that he could have an understanding, and that there would be about $75 in it for him and his wife on each claim, and that he went up to see Dr. Gesner, that he heard Dr. Gesner talking to some parties and went up and heard Dr. Gesner say that he would have to take a mortgage on the claims to make himself safe, and that afterwards he came back to town and saw Dr. Gesner there, and that he asked Dr. Gesner what Dr. Gesner would do and Gesner told him the claims would be worth $500, or that he would give $500 for it when patent issued but that he (Calavan) would be under no obligations to sell to Gesner.

Witness asked him if he wanted a mortgage and Gesner said he did not, that witness told him if he did that he would not locate him. Thereupon the application of said witness made before defendant Biggs was offered in evidence and introduced subject to the same objections and exceptions as in the matter of similar cases hereinbefore stated. Whereupon the witness was asked,

Q. "What was your understanding at the time as to what the terms were upon which you were taking it up?" To which the defendants and each of them separately objected as calling for a conclusion of the witness and incompetent, and not binding upon said defendant in any way but the objection was overruled by the court to which ruling each defendant then and there excepted and

307 the witness answered "Why I understood that I was to receive $500 for the same when patent issued." And thereafter the further question was asked of the said witness, Q. "And was it your intention at the time you were making that filing to convey it for the $500 as soon as you did get patent, or what was your intention in respect to it." To which each of the defendants then and there objected upon the ground that it called for a conclusion of the witness and was incompetent and not binding on said defendant in any way, and thereupon the objection as to each defendant was overruled and each defendant then and there excepted to the ruling and the witness answered, "My intention was to convey it to them when I got patent," Q. "To whom?" A. "To Gesner." And thereupon said witness having testified that he made final proof and his final proof papers having been identified and being substantially the same as in the case of the witness Watkins hereinbefore set forth, the same, with the cross-examination of claimant were offered in evidence to each of which papers, each of the defendants objected as incompetent and immaterial, and variant from the indictment and not binding in any way upon said defendant, and as being a transaction subsequent to the completion of the conspiracy alleged in the indictment, but the objection was overruled and each of the

defendants excepted to the ruling of the court upon each of said papers.

The following is all of the testimony of the aforesaid witness Joel Calavan introduced at the trial:

308 JOEL E. CALAVAN a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

Question by Mr. HENEY:

Mr. HENEY: I want to ask, at this time, for the check dated Dec. 4, 1902, for $9.00, if you can produce it, any time before the end of the trial.

Mr. BENNETT: I don't know anything about that.

Mr. HENEY: Or the stub book for it. Check Dec. 6, 1902, for $19.00, and Dec. 13, 1902, $19.00, and the two checks Dec. 5, 1902, one for $2056.25 and one for $822.50, and the stub book.

Q. Mr. Calavan, where do you reside?

A. Why, I have been stopping at Scio for the last three months.

Q. Where did you live in 1902?

A. Near Prineville.

Q. What were you doing there?

A. Why, my main business was teaching school; I was running a ranch too, but of course I was in the school room the biggest part of the year.

Q. Were you married at that time?

A. Yes, sir.

Q. Did you and your wife make timber filings in 1902?

A. Yes, sir.

Q. Who, if anybody, first spoke to you about it?

A. Mr. Biggs.

Q. Just tell the whole story.

309 A. Well, I met Mr. Biggs on the street there in Prineville, and he asked me if I had taken a timber claim, and I told him I hadn't. And he said, "If you and your wife want to take a claim, Mr. Gesner will locate you and give you $500.00 for your claim when the patent issues," for your claims, rather. And I asked him if we could do that kind of business—if it would be legal, and he said he couldn't make any contract. He said we could have an understanding. And then I asked him how much there would be in it for me. He said about $75.00 for each claim.

Mr. BENNETT: What say?

A. I asked him how much there would be in it for me; he said about $75.00 for each claim.

Q. And what reply did you make to that?

A. Why, I think I told him that wasn't very much, and he said it would be better than nothing, or something to that extent, and then he told me that Mr. Jones and wife were going up to locate and he himself expected to locate, and he wanted me, if I could go, to

go up right away. He said Mr. Gesner would be up there surveying. So I saw Mr. Jones that same evening. I met him a few minutes afterwards, and we made arrangements to go up together.

Q. Then you and your wife went up, did you?

A. We went up the next day I think.

Q. And whom did you see up there?

A. Well, we drove; we saw Mr. Gesner and Charley Graves, and there were others there, but I don't remember the names of all of them. I think Frank Ray, and perhaps Green Beard. I think I remember seeing them there, I don't remember the names.

Q. While you were up there, what talk took place. Just tell the jury everything that you recollect.

A. The first thing that took place, Mr. Jones was very
310 sick when we arrived there and I went to the house to get them to come out and see if he could relieve him and he doctored him up a little and I think we had dinner about the next thing, and then he was talking—I saw him talking to those parties that were there.

Q. Saw whom talking?

A. Mr. Gesner. And I think I went up to where they were talking and I heard him tell them that he would have to take a mortgage on the claims to make himself safe.

Q. Do you remember anything else that was said there?

A. That is all I remember.

Q. Now what did you do after that?

A. Why, we didn't do anything. I stayed around there that evening with Mr. Jones, he was sick all that evening, and we didn't go out to look at the timber until the next morning, and the next morning, he told Mr. Wakefield to take us out and show us the certain section.

Q. Who told him?

A. Mr. Gesner. And so he (Mr. Wakefield) took us all out except Mr. Jones to look over this section. And that afternoon, I hitched up to the rig and drove down with Mr. Jones and the next morning, we came home.

Q. Hitched up the rig and drove Mr. Jones down?

A. Down to where the timber was.

Q. To this section that you had looked up?

A. To this section that we were looking over.

Q. Now, when did you file?

A. We filed two or three days, I think, afterwards. Sometime about the middle of the week, I think.

Q. Did you have any talk with Mr. Gesner before you filed?
311 A. Yes, sir.

Q. Where was that?

A. That was, I think, on the street, near the First National Bank.

Q. In Prineville?

A. Yes, sir.

Q. And when was it with reference to the day you filed?

A. Why, I think it was a day or two before I filed.

Q. Now, what was that talk?

A. Why, I asked him—I hadn't made any talk with him about the proposition, and I was asking about what he would do, and he said the claim would be worth $500, or he would give $500 for it when patent issued. But he says "you will be under no obligation to sell to me."

Q. What further was said?

A. That was all, I think. That is all I remember.

Q. Was anything said about the mortgage?

A. Yes, I believe there was. I think I asked him if he wanted a mortgage, and he said he didn't want a mortgage on our claims. I told him if he did, why, I wouldn't locate.

Q. Was anything said about why he wanted the claim filed on?

A. Why, I think he told me that he wanted to protect his range from other stockmen.

Q. Now then when you filed who was present.

A. Why, my wife was present and I didn't know whether Mr. Jones and his wife were there or not. I have forgotten.

Q. Did you sign these two papers at the time you filed?

A. Yes, sir.

Q. Were you sworn to them?

A. Yes, sir.

312 Q. Did Mr. Biggs call your attention to this clause in the papers:—"That I do not apply to purchase the land above described on speculation, but in good faith, to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the government of the United States may inure, in whole or in part to the benefit of any persons except myself." Did he call your attention to that, or was anything said by you in reference to it, to him?

A. Yes, sir. Yes, sir.

Q. State all that he said.

A. Well, I asked him about that "speculation" and about "for my own benefit" and he told me that the $75 that I would receive would be for my own benefit.

Q. Was anything further said in regard to that part of it which says that "I have not directly or indirectly, made any agreement or contract, in any way or manner?"

A. Yes, I think so.

Q. What was said as to that?

A. Why, I think he told me that he couldn't make any contract or agreement, further than we could have an understanding.

Q. What was your understanding at the time as to what the terms were upon which you were taking it up?

Mr. BENNETT: That is objected to on the same ground, your Honor, calling for a conclusion of the witness, and incompetent and not binding on the defendant in any way.

Objection overruled.

A. Why, I understood that I was to receive $500 for the claim when patent issued.

Q. And was it your intention at the time you were mak-
313 ing that filing, to convey it for the $500, as soon as you did get patent?

Same objection.

Q. Or what was your intention in respect to it?
A. My intention was to convey it to them when I got patent.
Q. To whom?
A. To Gesner.
Q. Did you see your wife file?
A. Yes, sir.
Q. Before she filed, and before you went up to the timber, did you tell her what Biggs had said to you?
A. Yes, sir.
Q. You repeated it just as you have testified to it here?
A. Just as nearly as I can remember.
Q. Did you see the notice of final proof published?
A. Yes, sir.
Q. Did you pay your filing fees?
A. Yes, sir.
Q. For yourself and wife?
A. For myself and wife.
Q. You made final proof did you?
A. Yes, sir.
Q. Did your wife also?
A. Yes, sir.
Q. Now before making final proof, did you have any further talk with Dr. Gesner, and if so when and what was it?
A. I think I asked him, just before it came time to make final proof, if he wanted me to prove up.
Q. What did he say?
A. He said, yes he did.
Q. What else, if anything, did he say?
A. He said that he wanted all those to prove up that owned
314 property. He wasn't afraid of them.
Q. Now did you go before Biggs to make your final proof?
A. Yes, sir.
Q. What, if anything, was said there?
A. To make final proof?
Q. In regard to final proof money.
A. Well, there wasn't anything said, I guess, at all. Perhaps there was something said about two or three questions there, but then I don't remember unless they are mentioned.
Q. Outside of any questions in this, did he say anything to you about a mortgage or note, or about your final proof money?
A. Oh, no, no, sir.
Q. Didn't he ask you for the money?
A. No, sir.
Q. You left the papers with him to be forwarded to the Land Office, didn't you?
A. Yes, sir.

Q. Is that your signature upon that paper?
A. Yes, sir.
Q. And did you swear to that before Mr. Biggs?
A. Yes, sir.
Q. And this one also?
A. Yes, sir.

Mr. HENEY: We will offer in evidence the sworn statement of Joel E. Calavan, dated July 18, 1902, in duplicate.
Marked "Plaintiff's Exhibit 40."

Mr. HENEY: We will also offer the sworn statement of Aver B. Calavan in duplicate, dated July 18, 1902.
Marked "Plaintiff's Exhibit 41."

Mr. HENEY: We will offer these two papers in evidence
315 being the testimony of claimant upon final proof and cross-examination of Claimant in connection with direct examination.
Marked "Plaintiff's Exhibit 42."

Q. I will call your attention to these questions and answers in your final proof cross-examination: "Q. 13. Do you know of any capitalist or Company which is offering to purchase timber land in the vicinity of this entry? If so who are they, and how did you know of them? A. No. Q. 14. Has any person offered to purchase this land after you acquire title? If so, who and for what amount? A. No."
Do you remember those questions and answers?
A. I think so.
Q. Now did you have any talk with Mr. Biggs at the time of making those answers, in regard to them, and if so what was it?
A. I think we had a talk but I don't know as I could tell it just as it was.

Mr. BENNETT: What say?

A. I think we had some words about that; talked about that some but I don't know as I can give the words that we used.
Q. Can you give the substance of what was said?
A. Perhaps I can give some of the substance.
Q. What was it?
A. Read the first one again.
Q. "Do you know of any capitalist or company which is offering to purchase timber land in the vicinity of this entry? If so who are they and how did you know of them?"
A. I didn't know of any capitalist at that time save the talk we had with Mr. Gesner, and the way it was construed there to me, or the way we construed it, rather, that he was not purchasing.
Q. The question here is, 'offering to purchase.'
A. Yes. Well, that was about the substance of it.

316 Mr. BENNETT: We are not charged with perjury in relation to that matter.
Mr. HENEY: I think all the conversation of the parties at the time

of this transaction is a part of the *res gestæ*. They are charged with having suborned him to commit perjury as to certain acts in this particular paper. Now what talk he had in regard to the other questions on this paper is competent evidence as tending to prove with other circumstances, what the real intent of the parties was, in relation to the other questions and answers directly involved in the charge.

COURT: Of course, if that was subsequent, it would not be material, the answer to that question. Its only relevancy would be as you say, as being a part of the transaction surrounding more material parts. It might go in for what it is worth. I don't regard it as at all important.

Mr. HENEY: If your Honor please, in order that I may be perfectly understood in regard to this, the intent of the parties is material and absolutely material in this case. Their intent to be drawn from what they said to each other as to whether that constituted an agreement to transfer this land. Now then, they admit portions of the conversations and portions of the acts, which, taken together, we claim prove the agreement, but they deny the intent with which these things were said and done, and whenever the intent of a party in doing a thing is material, it is competent to prove other transactions of a similar nature, even though not a part of this same transaction, in order to show the intent, and if the same parties in reference to the same transaction, induced perjury on other questions, it would be competent to show that fact, as throwing light upon the intent with which these other acts were done and things said!

317 COURT: I understand your position perfectly. As I say, its relevancy only is that it is one of many circumstances that the prosecution is seeking to adduce as bearing upon the substantial proposition of the intent of the parties. In that respect it is admissible for what it is worth.

Mr. BENNETT: We take an exception, your Honor.

Q. Now, what did Biggs say, if anything, with reference to your answering these two questions in this way? For instance, the next question is—"Has any person offered to purchase this land, after you acquire title? If so, who and for what amount?" the answer is "No."

A. I cannot give you the words. I don't remember what he did say. There was something said, but just what, I don't remember.

Q. Was anything said as to how that question was being answered by other parties?

A. I think there was something said. There was something said about that on some of the questions; perhaps that was one of them; that that was the way that most of them were answering them.

Q. Did Mr. Biggs suggest to you that that answer was not proper, in view of your conversation with him?

A. That it was not proper?

Q. Yes.

A. I don't think so.

Objected to as leading.

COURT: That is objectionable as leading.

Q. Did Mr. Biggs make any suggestion to you to the effect that you ought not to answer that in that way, or at the time you were testifying, did he call your attention before taking the testimony—did he read to you section 2392 of the revised statutes in regard to perjury?

318 A. I do not remember as to that.

Q. What is your best recollection as to whether he did or not read that section in regard to perjury?

A. Well, my best recollection is he didn't.

Q. Did you ever receive a patent to this land?

A. No, sir.

Q. Did you ever receive any notice in regard to it?

A. Yes, sir.

Q. What?

A. I had two or three letters I think, speaking about that, at the Land Office at The Dalles.

Q. Did you receive the money or a check back from the Land Office?

A. Yes, sir. I received a check.

Q. Is that it, and is that your signature on the back of it?

A. This is my signature.

Q. What did you do with the check after receiving it?

A. I sent them back to Mr. Gesner.

Q. Is this your wife's signature on the back of that one?

A. Yes, sir.

Q. Did you receive both checks at the same time?

A. At the same time.

Q. And you sent both of them to Gesner, did you?

A. I sent both of them at the same time.

Mr. HENRY: We will offer these checks in evidence. Marked "Plaintiff's Exhibit 43" and "Plaintiff's Exhibit 44."

Q. Look that over. (I hand the witness Plaintiff's Exhibit 33). Were these checks accompanied by a letter similar to that?

A. Yes, sir.

Mr. HENRY: This is a letter which has been read to the jury in which they are advised that the claim is in no way jeopardized, and that, after the Government has investigated, they find it all

319 right, they will be called on to return the money and can get their patent.

Q. Were you present when your wife made final proof?

A. Yes, sir.

Q. And before whom was that?

A. Mr. Biggs.

Q. And is that her signature upon that paper?

A. Yes, sir.

Q. And upon this one?

A. Yes, sir.

Q. You saw her sign those two papers before Mr. Biggs?

A. I saw her sign them, yes, sir.

Q. Saw her sworn to them?
A. Yes, sir.

Mr. HENEY: We will offer those two papers in evidence. It is testimony of claimant Aver B. Calavan on final proof, and the cross examination on final proof.
Marked "Plaintiff's Exhibit 45."

Q. Was there any talk between her and Biggs, other than the talk you have testified to as being made by you?
A. I don't think so.

Cross-examination.

Questions by Mr. BENNETT:

—. Mr. Calavan, when was it you had the first talk with Biggs, as near as you remember?
A. It was just before I went up to look at the timber. I think the day before. It was sometime after or about the 25th of June; I think it was after that time.
Q. Had you talked with Biggs or anybody about timber claims before that?
A. No, sir.
Q. What say.
320 A. Not that I remember of.
Q. You don't remember having talked with anybody?
A. Not that I remember of.
Q. Where were you when you had this talk?
A. On the street, right close to Mr. Wurzweiler's store.
Q. Had you heard that Dr. Gesner was loaning money on timber claims?
A. Not until Mr. Biggs told me.
Q. That is the first you remember hearing of it?
A. That is the first I heard of it. I hadn't heard that he was locating or doing anything of the kind until Mr. Biggs told me.
Q. And Mr. Biggs told you that he was loaning money?
A. Yes, sir.
Q. On timber claims. And was it in that conversation that you asked him about the matter, and he told you that a claimant could not make a contract for the sale of it?
A. Yes, sir.
Q. During that conversation. And you told him that $75 wasn't very much.
A. Yes, sir, I think so.
Q. Well, didn't you figure it up between you how much it would be if you sold it at $500?
A. Well, we didn't figure it. He said that he had figured it out; it would be about $75 he didn't know it would be exactly $75 but close to that.
Q. Did you ask him about that?
A. Yes, sir.
Q. Did you ask him how much it would take?

A. Yes, sir.

Q. He figured it up for you. And didn't he tell you in this same conversation that you might get more for it?

321 A. I don't remember.

Q. Didn't you and him figure about that——

A. I don't think so.

Q. And from that time on, about selling it at a higher price to eastern parties?

A. I don't think so.

Q. Don't you remember ever having any talk with him?

A. I don't have any recollection to that effect.

Q. What say?

A. I have no recollection to that effect.

Q. Do you know Mr. Hayner up there?

A. No, sir.

Q. Mr. Hayner, don't you know Mr. Hayner?

A. I don't know him. I don't know his name. I never heard it before as I know of.

Q. Never heard of such a man as Mr. Hayner up there?

A. I don't remember it.

Q. Wasn't there a man by the name of Hayner up there?

A. I never met the man as I know of; if I met him, I don't know his name.

Q. Wasn't there a man up there by that name that was figuring on finding a purchase- for these lands for you in the East?

A. Not that I know of.

Q. Do you claim that there wasn't anybody figuring on finding you a purchaser, in the East, for the land up there at any time?

A. Not that I know of.

Q. Wouldn't you remember a thing like that?

A. No, sir.

Q. You don't think you would remember it?

A. I don't remember it.

322 Q. What say?

A. I don't remember it if there was.

Q. But I say, do you think you would remember it, if it had happened?

A. Why, I think I should, yes.

Q. You think you would?

A. I think I should.

Q. You don't remember of ever talking with Mr. Biggs at all, about being able to get more for that land than $500?

A. No, sir.

Q. You do swear though that Mr. Biggs told you that you could not make a contract for the sale of the land?

A. Yes, sir.

Q. That was when you had the first talk with him?

A. That was when I had the first talk.

Q. Now at the same talk there then it appears, I believe, that you said there was some talk between you, that you had a right to take

the land with the calculation of selling it because the price you got for it would be for your benefit.

A. Well, I don't know whether it was just those words; he said something about there would be that $75 would be to my benefit.

Q. Well, now wasn't it the price that would be to your benefit?

A. I don't remember about that.

Q. Whatever you got for the land would be to your benefit.

A. That I can't say. I don't remember.

Q. Your memory is, it was the $75?

A. Yes, my memory is that it was the $75.

Q. Now how long after he told you that you couldn't make a contract was it, that you went up to see Gesner about the land, about filing on it?

A. Why, I think the next day we went up to the timber.

323 Q. What say?

A. I think it was the next day we went to the timber, and we were up there two days and came back the third, that is, we came back Sunday morning, I think, and it was on Monday, I think, I was talking to Mr. Gesner. I am not certain it was Monday.

Q. The first talk you had with Mr. Gesner was up to the timber?

A. I never had any talk with him in relation to the price or anything. I had no talk to him about that.

Q. No, nor before, in relation to loaning the money?

A. No.

Q. Except that you did hear him make the statement to some of these up there?

A. Yes, I heard him make the statement.

Q. That he would have to take a mortgage to make himself safe?

A. Yes.

Q. That is all you heard there?

A. Yes, sir.

Q. You didn't hear the first part of the conversation?

A. No, as I know of.

Q. You saw him talking to these people and went up there?

A. Yes, sir.

Q. Then you didn't hear the first part of the conversation?

A. No, I don't think I did.

Q. You saw him talking but you couldn't hear what he was saying at first?

A. I think that is it.

Q. Now you don't know then whether he told them up there that there wouldn't be any contract, or that they wouldn't be under any obligation or not?

A. No, sir, I don't know.

324 Q. You don't know whether he told them that he had taken legal advice as to what he had a right to lawfully do or not?

A. No, sir.

Q. Now you came down and the next Monday you say you saw Gesner?

A. It was Sunday we came home. I don't know whether it was Monday or Tuesday, I saw him the first of the week.

Q. And did he tell you that he would loan you the money then?
A. Yes sir.
Q. Now, you said that he didn't demand a mortgage?
A. No, sir.
Q. It was arranged between you that you were to give a note, wasn't it?
A. He spoke something about a note, yes, sir.
Q. But not a mortgage?
A. No, not a mortgage.
Q. Now did he tell you in that conversation that he would give you all the time you wanted?
A. I don't remember as to that.
Q. You don't remember what was said about time at all?
A. No I don't know that there was anything said about the time.
Q. Did you give a note?
A. No, sir, I didn't give a note.
Q. You didn't give a note, finally?
A. No, sir, I didn't give a note.
Q. Now in the talk about buying the land, he told you that when you got title, if you wanted to sell, he would give you $500, or it would be worth $500?
A. It would be worth $500, or he would give $500 when the patent was issued.
Q. You don't remember just exactly which he said?
A. I think he said both.
325 Q. You think he said both ways?
A. Yes.
Q. But he said you would be under no obligations to sell to him?
A. Yes, sir.
Q. He said you could sell to whom you please if not to him?
A. He may have. I don't remember about that.
Q. But he said you would be under no obligations to sell to him?
A. Yes, sir.
Q. Did he tell you at that time that he had taken legal advice as to what he could do in relation to the matter?
A. I don't remember if he did.
Q. But he told you at that time that he could not make any contract, didn't he?
A. I think he did. I am not certain as to that, but I think perhaps he mentioned that.
Q. And that you could not make any contract. And didn't he tell you that he could make an offer; that he had been advised that he had a right to make you an offer?
A. I don't think so.
Q. Or name to you how much the land would be worth to him in case you wanted to sell?
A. He may have said something about that, but I don't remember anything about that, whether he did or not.
Q. Mr. Calavan, have you ever been a witness here in this case before?
A. No, sir.

Q. You were subpœnaed here by the government at the last trial, were you?
A. At the second trial.
Q. And held here how long?
A. I was here four or five days.
326 Q. Five days?
A. Four or five days; I think I came on Tuesday.
Q. But you were not called as a witness?
A. No sir.
Q. Now at the time you were here at the other trial did you say to Dr. Gesner that you had never made a contract, and you didn't see how some of them could swear there was a contract?
A. I don't remember whether I did or not.
Q. Don't remember about that?
A. No, I don't remember whether I said anything to him or not.

Redirect examination:

Q. You appeared before the Grand Jury, did you?
A. Yes, sir.
Q. That is, lately?
A. Yes.
Q. Just before this trial?
A. Yes, sir.
Q. Did you ever admit before that, to me or any other government officer, that you had had any such talk with Biggs, as you have testified to?

Mr. Bennett: We object to that your Honor, as being an attempt to impeach their own witness and as impartial and incompetent.
Court: What is the purpose of it? Is it an attempt to impeach the witness?
Mr. Heney: No. They have brought out the fact that this witness was brought here at two other trials and was not put on the stand.
Court: You didn't have the knowledge?
Mr. Heney: Didn't have the knowledge.
Court: He may answer. That is not an impeaching question.

327 (September 13, 1905.)

Joel Calavan.

Q. You never told that to any government officer or to me until you told it here in the Grand Jury since the other two trials took place?
A. No, sir.

Judge Bennett: We object to that for the same reason.
Objection overruled. Defendants except.
Mr. Heney: I think that question and answer ought to go out, your Honor, upon reflection, because it carried with it that he did say

the same thing before the Grand Jury, and I don't think I would have a right to prove that.

Mr. BENNETT: The effect of that is to get the testimony before the Grand Jury and deprive us of our legal exceptions.

Mr. HENEY: No, I want to change the form of the question and get the result I am after in another way.

The COURT: It may go out.

Q. Now at any time prior to the time you appeared here as a witness before the Grand Jury did you tell me or any of the government officers that you had testified to here, in relation to your conversation with Biggs?

The same objection.

The COURT: Before he testified before the Grand Jury?

Mr. HENEY: Yes, before he appeared here as a witness before the Grand Jury.

Objection overruled.

Defendants except.

A. No, sir.

Q. You did testify before the Grand Jury?

A. Yes, sir.

328 A. No, sir.

Mr. BENNETT: We object to the question your Honor, as leading, incompetent and an attempt to impeach their own witness, and to show his statements out of court.

Mr. HENEY: We are not showing his statements.

Q. You never told that to any government officer, or to me, until you told it here in the Grand Jury since the other two trials took place, did you?

A. No, sir.

Same objection.

Objection overruled.

Defendants except.

329 Q. After that did you have a conversation with Dr. Gesner?

Mr. BENNETT: We object to that question on the same grounds.

Mr. HENEY: That is for the purpose of fixing the time of the conversation with Dr. Gesner.

The COURT: For that purpose it is proper.

Defendants except.

Q. After appearing there as a witness, did you have any conversation with Dr. Gesner?

A. I met Dr. Gesner on the street one evening and had a little talk with him.

Q. Prior to that time had you any conversation with him as to whether or not you had been subpœnaed to appear before the Grand Jury?

A. Prior to that time, during this trial?

Q. At any time prior to that time did you have any conversation with him as to whether or not you had been subpœnaed to appear before the Grand Jury?

A. I don't think so.

Q. At the time you met him on the street, what talk did you have with him?

A. I met him on the street, shook hands, and he asked me how every thing was getting along; I told him all right so far as I knew. He further asked me if I had been before the Grand Jury. I told him I had and he asked me what I said. I told him I thought I said a good deal. And I think he asked me, he says "You know there was no contract," and I told him that there was this much, that he had said the land was worth $500, or he would pay $500 when patent issued.

Q. What did he say?

A. I think he asked if I would not come to his room about
330 eight o'clock that evening and I told him that I could not, because it would cause trouble, the government boys knew all of our movements, know where we are, and I had better not go. And——

Q. Was there anything else?

A. Just a little.

Q. What is it?

A. He told me that he did not want to bribe me, and I told him, "No, of course not."

Q. In this conversation you had with Biggs, where he said you could not make a contract, what else did he say on that subject.

A. Why, I think about all he said was we could have an understanding as to what we were to receive for it.

Q. That was in the same talk was it?

A. That was in the first talk. I think it was the only talk we had had about it, was in the first talk.

Q. This talk you had with Gesner, when he said he wanted those who had property to prove up, what else did he say?

A. He said he was perfectly willing for all the others who had property to prove up. He was not afraid to trust them.

Q. Was there anything said in that talk by him, about trouble about the government?

A. No, I don't think so; I don't remember it.

Recross-examination.

Q. In this talk with Dr. Gesner here in town, where were you?

A. We were on Alder Street. I don't remember, I think about eighth street on Alder.

Q. He asked you if you had been before the Grand Jury?

A. Yes, sir.

Q. And he asked you what you testified?

A. I think he asked me what I said, not what I testified, but what I said.

331 Q. What did you tell him?

A. I told him I thought I said a good deal.

Q. And then he mentioned his claim that there was no contract?

A. Yes.

Q. And you told him what?

A. I told him that there was this much, that he said it was worth $500, or would give that when patent issued.

Q. And he told you that is the way he understood it too, didn't he?

A. Yes, sir; he said he had a right to do that.

Q. And he told you that was the way he understood it, just the way you did, and didn't he tell you in that connection that the defendants might want to use you as a witness?

A. I don't know; I don't think he did. I don't remember if he did.

Q. Didn't he tell you that was the reason he wanted you to come up to his room, because you understood the talk about the contract just — he did, and said he might want to use you as a witness?

A. I don't think so. I don't think he mentioned anything about wanting to use me as a witness. He simply asked me to go up to his room to have a talk.

Q. And tell us what he knew, didn't he?

A. He did not tell me what he wanted me to tell.

Q. You refused to go?

A. I told him I had better not go, it would cause trouble.

Q. Who was it you told him was watching you or knew where you were?

A. I told him the government boys would know all about it, they would see us.

Q. Did you say the government boys or the detectives?

332 A. I think I told him the government boys. I don't think I mentioned the detectives.

Q. You met the detectives, did you?

A. I met those that are in the service of the government, detectives or what.

Q. You meant to convey the idea to him that you were all watched and that they kept track of what you were doing all the time?

A. Yes, sir, that is what I meant.

Q. You knew that to be the fact?

A. Well, I supposed it to be the fact; I didn't know it to be the fact. I did not know that I was watched, but I had *no* idea I was.

Q. Didn't he tell you in that talk that it did not make any difference, that he thought he had as much right to talk to you as anybody?

A. I don't remember whether he said that or not; I don't remember.

Q. Now, was there not some detectives coming and standing close to you while you were talking to him?

A. Yes, sir; there was a man came to the corner there, and he asked me if that was one of the boys, and I told him I did not know.

Q. One of the boys or one of the detectives?

A. Or one of the detectives I presume he meant. Yes, he may have mentioned detective. He asked me if that was one of them and I told him I did not know, perhaps, but I did not know.

Q. You thought it was?

A. I did not know but what it was that I had that idea that it was.

Q. That it was not?

333 A. That it was one.

Q. Had you seen him around before?

A. No sir, I had not seen him until he spoke about him. I think he spoke about him first.

Q. I mean have you seen him around before, the same man around the Court House?

A. No, sir, I don't think so.

Q. And didn't he tell you in a conversation that he did not want to influence you in your testimony in any way?

A. I don't remember whether he did or not.

Q. Was not that the substance of it?

A. I don't remember it that way; he might have said something to that effect. I don't remember it. I don't know.

Q. Didn't he tell you that he didn't want to influence your testimony in any way or bribe you in any way or corrupt you in any way?

A. He told me he did not want to bribe me.

Q. You think he told you that he did not want to bribe you?

A. I know he did.

Q. Do you think he did not use the word influence in any way?

A. I don't remember as to whether he did or not.

Q. Didn't he tell you all he wanted to know was to know what you knew in the case and have his attorneys know it?

A. No sir.

Q. So as to make their defense and have the benefit of your testimony where it was favorable to him?

A. No sir, he did not tell me that.

Q. Didn't he tell you anything about that at all?

A. No sir.

334 Redirect examination.

Q. You had a talk with Dr. Gesner when you were here under subpœna, during the second trial, didn't you?

A. Why, I think we talked a little; I don't know whether it was about the trial or not.

Q. Didn't he tell you that he wanted to use you as a witness, or say something about that?

Objected to as leading.

A. No, not at that trial.

Q. Which trial was it?

A. Why he may have spoken to me before the trial began, before the first trial began.

Q. All right before the first trial began, did you have a talk with him?

A. I think he said something about it then.

Q. What was said.

A. Why, he was talking something about using me as a witness. I told him I did not think I could do him any good. I would have to tell the truth when I was put on the stand, and he told me that was what he wanted me to do.

Q. Then he did not try to use you when you were here under subpœna the first trial?

A. No sir.

Q. You were not asked to take the stand?

A. No sir.

Recross examination.

Q. What time in that trial were you discharged by the government?

A. On Saturday, I think.

Q. How far had the trial progressed at that time?

A. Why the witnesses were all through.

Q. On both sides?

335 A. On both sides, I think. I think we were discharged together most of us.

Q. When you told him you would tell the truth, he told you that was just what he wanted you to do?

A. Yes, sir. That's what he said.

Q. That is all the talk you had with him at that trial?

A. I think so. That is all I remember at least.

Excused.

336 Thereafter Wilford J. Crain was called as a witness for the Government and having identified his sworn statement and application similar to those heretofore referred to in the case of other applicants, as having been sworn to before the defendant, Biggs, and testifying in relation to a conversation with Biggs at the time he signed said application, testified that he asked Biggs if it would be all right for him to sign the paper with that understanding knowing what I was going to do with the land and that Biggs told him that it would be all right provided he had made no contract, and having been asked the question "What did you say to that?" Answered "I had not made no contract." Whereupon the witness was asked the question "What do you understand by a contract?" To this the defendants objected as incompetent and immaterial and not binding in any way upon the defendants, but the objection was overruled and the defendants excepted and the exception was allowed, whereupon the witness answered, "Well, I don't know as I really understand a contract; but my idea is that it would be written." "Q. That was your idea at the time, was it?" A. "Yes sir." And thereafter the witness was asked the question, "Now at the time that you filed what was your intention as to what you would do

with the land when you got title?" To which the defendants objected as incompetent and immaterial and not in any way binding upon the defendants, but the objection was overruled and the defendants excepted and their exception was allowed whereupon the witness answered, "It was my intention to let Gesner have it." Q. "What was your understanding as to whether you had promised to do that or not?" To this the defendants objected and the Court ruled that he might state his belief to which ruling the defendants then and there excepted and their exception was allowed and the question was then asked, "Well what did you believe," to which

337 the defendants objected as incompetent and immaterial and not binding in any way upon the defendants, but the objection was overruled and the defendants excepted and their exception was allowed, whereupon the witness answered "Well, I would have felt that way if I had went ahead and proved up on the land and they had furnished me the money to do it with." Whereupon the witness was asked the following question, "What was your understanding of it?" To which the defendants objected, being a leading question and calling for the understanding of the witness, but the objection was overruled and the defendants excepted and their exception was allowed, whereupon said witness answered, "Yes sir."

The following is all of the evidence of the aforesaid witness Wilford J. Crane introduced at the trial.

338 SEPTEMBER 12TH, 1905.

WILFORD J. CRAIN a witness called on behalf of the Government, being first duly sworn, testified as follows:

Questions by Mr. HENEY:

—. Mr. Crain, you are the son-in-law of John S. Watkins?

A. Yes, sir.

Q. And you live up in the vicinity of Prineville with him, do you?

A. No; not exactly with him. I live neighbor.

Q. Were you working for him in 1902?

A. Yes, sir.

Q. And did you file on a timber claim in 1902?

A. Yes, sir.

Q. Who first spoke to you about it?

A. John Watkins.

Q. Whose name did he mention in connection with it, if anyone's?

A. Yes, sir.

Q. What did he say to you as to what Biggs told him, if anything?

A. I don't remember now what he did say.

Q. Do you remember the substance of it; before you started up to the timber?

A. I believe he said that Biggs told him that Gesner was wanting people to take timber claims,—something in regard to that.

Q. Well, did he say anything about where, or what the terms were, or anything of that sort?

A. Why, it was in the Horse Heaven country.

Q. Did he say anything about the terms?

A. Yes, sir.

Q. What did he say?

A. He said they would give $500 after we had the title to the claim.

339 Q. And did you have money to take up a claim with at the time?

A. No, sir.

Q. Was anything said about that—where the money would come from?

A. My understanding was that Dr. Gesner was to furnish the money.

Q. What did Watkins say about it, if anything? Did Watkins tell you where the money would come from?

A. Yes, sir.

Q. What did he tell you?

A. He said that Dr. Gesner would furnish us the money.

Mr. BENNETT: Of course, this goes in subject to our general objection, your Honor. We want this to go in subject to our general objection that we have been making to the same kind of proof.

Q. Was anything said about how much profit there would be in it?

A. About $75.

Q. Now then, how soon after he spoke to you about it, did you go up to the timber?

A. I don't know. It was a few days.

Q. And who went along?

A. John Watkins and his wife and George Gaylord and my wife and me.

Q. Now just tell the jury all that happened after you got up there.

A. Well we got up there to the timber and met Dr. Gesner and Newt. Williamson, one of the Wakefield boys, Chester Starr, and Henry Beard. Had lunch there, and got the numbers of the land and returned home.

Q. How did you get the numbers of the land?

A. Mr. Williamson wrote them down in Watkins' account book.

Q. Did you see him do it?

A. Yes, sir.

Q. What if anything was said about what land you were to file on?

340 A. I don't hardly remember in regard to that how that was.

Q. Did you go and look at any corner?

A. Yes, sir.

Q. Look at the numbers on it?
A. Yes, sir.
Q. Now, when you came back when did you go to file?
A. I believe it was the next day. It might have been the same evening.
Q. Whom did you go before?
A. Biggs.
Q. At that time did you sign those two papers? Is that your signature on each of them?
A. Yes, that is my signature; yes, sir.
Q. Were you sworn to them at the time?
A. Yes, sir, I think I was.

Mr. HENEY: We will offer these papers in evidence.
Marked Plaintiff's Exhibit 34.

Q. Did you have any talk with Biggs at the time you signed those papers, and if so, what was it?
A. I had a little talk with him in regard to the papers, whether there would be anything wrong in signing them with that understanding.
Q. Did you deed the paper?
A. Yes, sir.
Q. Do you remember this part of it? "that I do not apply to purchase the paper above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the United States may inure in whole or in part to the benefit of any person except myself."
A. Yes, sir.
Q. What talk, if any, was had in regard to that? What was said?
341 A. I don't remember just word for word.
Q. No. Just tell the substance of it to the best of your recollection—all that you can remember.
A. I believe I asked him if it would be all right—me signing the paper, with that understanding, knowing what I was going to do with the land; and he told me it would be all right providing I had no contract.
Q. What did you say to that?
A. Well, I hadn't made no contract.
Q. What do you understand by a contract?

Objected to as incompetent, immaterial and not binding on the defendants in any way.
Objection overruled.
Defendants except.

Q. What do you understand by a contract?
A. Well, I don't know as I really understand a contract; but my idea is that it would be written.
Q. Written?

A. Yes, sir.
Q. That was your idea at the time, was it?
A. Yes, sir.
Q. Well, now, did Biggs say anything about that to you?
A. Yes, I believe he did.
Q. What was it he said?
A. Well, he give me the understanding that it would be all right, provided I hadn't contracted to no one or promised the land to no one.
Q. Well, did you tell him what Watkins had told you?
A. Yes, sir.
Q. Did you tell him that you intended to let Williamson and Gesner have it?
A. Yes, sir, and he asked me if I had ever talked with them about it. I told him I had not.
342 Q. Then what did he say?
A. He said that it was all right.
Q. Now at the time that you filed what was your intention as to what you would do with the land when you got title?
A. It was my intention to let Gesner have it.

Mr. BENNETT: My same objection goes to all this, your Honor.
JUROR: Speak louder:

A. It was my intention to let Gesner have it.
Q. What was your understanding as to whether you had promised to do that or not?

Mr. BENNETT: We object to that, your Honor. Let him state the facts.
Mr. HENEY: This goes to the question of his belief at the time he made this.
The COURT: He may state his belief.
Mr. BENNETT: We object to it as incompetent, immaterial and not in any way binding on the defendants.

Q. Did you believe you were obligated?

Mr. BENNETT: That is objected to as leading.

Q. Well, what did you believe?
A. You mean, do I believe I was under obligation to let them have it.
Q. Yes.
A. Well, I would have felt that way if I had went ahead and proved up on the land and they had furnished me the money to do it with.
Q. Was that your understanding of it?
A. Yes, sir.

Objected to as being leading and calling for the understanding of the witness.

Q. Did your wife sign two papers at the same time?
A. Yes, sir; I think she did.

Q. Is that her signature on those?
343 A. Yes, sir.
Q. Did you prove up on these lands?
A. No, sir.

Mr. HENEY: We will offer these two in evidence. Marked Plaintiff's Exhibit 35.

Q. Was your notice of final proof published?
A. Yes, sir.
Q. Who, if anybody, spoke to you about not proving up?
A. I believe it was Watkins.
Q. Did you talk with Gesner or Biggs at any time?
A. No, I don't think I did before I relinquished.
Q. Did you see any letter from either one of them?
A. No, sir.
Q. When you relinquished you went before Biggs, did you?
A. Yes, sir.
Q. How long was that before final proof?
A. I think it was right about the time, if I remember right.
Q. What did Watkins say to you about it?
A. He told me that they didn't want me to prove up—me or my wife, and that we had better relinquish.
Q. Now, when you went before Biggs to relinquish did you have any talk with Biggs about it?
A. I don't think I did any more than he told me that Dr. Gesner would pay me my money back that I was out for the filing fees.
Q. Is that your signature?
A. Yes, sir.
Q. Is that the relinquishment you filed?
A. Yes; I think it is.

Mr. HENEY: We will offer that in evidence. Marked Plaintiff's Exhibit 36.

344 Q. Is that your wife's signature?
A. Yes, sir.
Q. Did she sign that before Biggs?
A. I think she did.

Mr. HENEY: We will offer that also. The date of these relinquishments is December 8th, 1902.
Plaintiff's Exhibit 37.

Q. Who else was there when you went before Biggs to relinquish?
A. George Gaylord.
Q. Now where did you go from Biggs' office?
A. Why, I think I went down town a little bit, and then to Dr. Gesner's office.
Q. Did anybody go with you to Gesner's office?
A. Yes, sir.
Q. Who?
A. George Gaylord.
Q. Now, who was in Gesner's office when you got there?
A. Mr. Williamson and Dr. Gesner.

Q. What, if anything, was said while you were there. State all that was said that you can remember.

A. I don't remember much about what was said. Gesner wrote me out a check for the money what I was out for the fees for me and my wife.

Q. Did you say anything to him about it before he wrote it?

A. I don't remember now whether I did or not.

Q. I believe it was $19.50?

—. ——.

Q. Do you remember how it was signed?

A. No, sir; I do not.

Q. What did you do with it after you got it?

A. Put it in my pocket.

Q. Well, what did you do with it after that?

345 A. Why, I cashed it. I don't know when it was, whether it was the same day or not.

Q. You went to the bank yourself did you?

A. Yes, sir.

Q. On the Prineville bank?

A. I think I did.

Q. Did you see Gaylord get one?

A. Yes, sir.

Q. At the same time?

A. Yes.

Q. Was Williamson present when you received it?

A. Yes, sir.

—. ——.

Q. Well, Mr. Williamson said that he didn't think it would be hardly safe to go ahead and try to make final proof on the claims now; that there was—I believe he said Hitchcock was making a little kick about timber frauds or something in regard to that. He went ahead and read a little sketch in the paper to us, in the Oregonian I believe it was, in regard to that. I don't remember just how it read now.

Q. Anything said about taking up a claim later?

A. Yes. He said he thought later on we could go ahead and file again and go ahead and prove up on the claims.

Cross-examination.

Questions by Mr. BENNETT:

—. Where did Mr. Watkins tell you that you could get the money?

A. He didn't say where I could get it. He said Mr. Gesner would furnish the money.

Q. He said Mr. Gesner was loaning money on timber claims, did he?

A. Well, I don't know whether he said he was loaning it;

346 I don't remember how he did word that.

Q. That was the substance of it?

A. Anyhow it was my understanding that Mr. Gesner was to furnish the money.

Q. When you went to relinquish you say you and Gaylord went together?

A. Yes, sir; I think we did.

Q. That was on December 8th, was it?

A. I think it was about that time as far as I remember.

Q. Well, do you know whether Gaylord and you went together or not?

A. Yes; I am pretty sure we did.

Q. And you relinquished before you went down to Gesner's at all did you?

A. I think we did.

Q. Then you and him went down together, did you?

A. Yes, sir.

Q. And you got your checks there together, did you?

A. Yes, sir.

Q. As you claim?

A. Yes, sir.

Q. And that is the time you claim Williamson was there, when you got your check?

A. Yes, sir.

Q. You say that you think that you went down town after you relinquished?

A. Yes, sir.

Q. Before you went to Gesner's office?

A. Why I don't remember. It seems to me like we maybe stopped along through town there before we went on to the office.

Q. After you got your check you think you went up to the
347 bank and cashed it?

A. I don't know whether I did or not that day. I don't remember whether I did or not.

Q. That day or the next day, eh?

A. No, I don't remember just when I did cash the check now.

Q. Did you walk along up with Gaylord along up town to the bank? Did you walk up to the bank with Gaylord?

A. I might have.

Q. If you did, you went in and cashed the check right there didn't you, if you got up as far as the bank?

A. Well, I might have and I might not.

Q. He was going in to cash his check?

A. I might have had a little change then, and didn't need to cash it then. I don't remember whether I cashed it at that time or not.

Q. Isn't it a fact, Mr. Crain, that you didn't go down to get these checks—you didn't go down to Gesner's office for two or three days after you relinquished? You didn't go down there as a matter of fact, until the 11th, did you?

A. I think it was the same day we relinquished.

Q. How was that check signed?

A. I don't remember how it was signed.

Q. Don't remember whether there was a long name to it or a short name to it?

A. No, sir.

Q. Wasn't it signed "Williamson, Wakefield and Gesner" by Gesner?

A. It might have been, I don't remember. I wouldn't know the check if I would see it again I don't suppose.

Q. What say?

A. I don't know whether I would know the check if I seen
348 it.

Q. Well, you endorsed it, didn't you?

A. Yes, sir.

Q. Well, you would know it by the endorsement, wouldn't you?

A. I think I would.

Q. Well, I wish you would examine that and see whether that is the check you got. Look at the name on the back.

A. That is my signature on the back.

Q. Well, that is the check, isn't it?

A. I think it is.

Mr. BENNETT: We offer that in evidence.

Marked Plaintiff's Exhibit A and read as follows:

Mr. BENNETT:

"PRINEVILLE, ORE., *Dec.* 11, 1902. No. —.

The First National Bank of Prineville, Ore.

Pay to the order of Wilford J. Crain $19.00, Nineteen Dollars.

WILLIAMSON, WAKEFIELD & GESNER,"

"By GESNER"

or "V. Gesner" I don't know which. Dated December 11. Endorsed, "Paid December 11, 1902, First National Bank," and on the back of it the endorsement, "W. J. Crain."

Q. Now, as a matter of fact, Mr. Crain, it wasn't until December 11th that you went down there and got your check, and then you went right up to the bank and cashed it, didn't you?

A. I don't remember. I thought I got the check—I think I got the check the same day I relinquish my right. I might be mistaken, but I don't think I am.

Q. Well now, after seeing the check and your endorsement on it what do you say as to whether it wasn't until the 11th that you went down there?

A. Well, it might have been the 11th when I was there. I don't remember nothing about it only the date on that relinquishment there, and I think it was the same day I got the check,—the
349 same day I am pretty sure I did.

Q. You remember that you didn't go right from Biggs' office right down to Gesner's office?

A. Well, I don't know whether I did or not. I went there the same day. I don't know whether I went right straight from there or not. I wouldn't swear I did and I wouldn't swear I didn't.

Q. Do you undertake to say for sure that you went down there the same day?
A. Yes, sir; I think I did.
Q. You think you did?
A. Yes, sir.
Q. You don't know whether you took the check up to the bank and cashed it that day or not?
A. No, sir; I don't remember.
Q. How does it come that you remember one thing so much better than the other?
A. Because I remember it was all done the same day to the best of my knowledge.
Q. Have you talked the matter over with Mr. Gaylord about that?
A. No, sir; I have not.
Q. Haven't talked it over with him at all?
A. No, sir. I might possibly be mistaken but I don't think I am. I think I went to Gesner's office the same day I relinquished.

Witness excused.

Adjourned until to-morrow morning at 9:30 a. m. 12.

350 PORTLAND, ORE., *Sept.* 13, 1905—9:30 a. m.

WILFORD J. CRAIN recalled for the government.

Direct examination.

Questions by Mr. HENEY:

—. Mr. Crain, at the time that you made your relinquishment, where were you living?
A. I don't remember. I believe I was living with Watkins. I ain't sure.
Q. Do you remember where you were working?
A. No, sir; I do not.
Q. Did you see the notice of publication of final proof for your claim in the paper?
A. Yes, sir; that is it.
Q. What date was your final proof set for?

Mr. HENEY: We will offer this affidavit of publication.
Mr. BENNETT: If you are offering it for the purpose of showing the date set for final proof we will probably admit that.
Mr. HENEY: Yes; and of who the witnesses were to be, and that this is a copy of the notice.
Mr. BENNETT: Well, I don't know that that is a copy of the notice. We will admit the date and who the witnesses were to be.
Mr. HENEY: Well, that is all we care for.
Mr. BENNETT: Just read who the witnesses were.
Mr. HENEY: This is affidavit of publication by Fogle subscribed and sworn to on the 15th day of December, 1902, by Biggs. It is dated September 23rd, 1902, Land Office at The Dallas, Oregon. Notice is hereby given that they will prove up on December 8th, they

name as witnesses George M. Gaylord, John S. Watkins, Lettie Watkins, Jennie Crain, and Wilford J. Crain; all of Prineville, Oregon, and the parties for whom the notice is given are George M.
351 Gaylord, John S. Watkins, Lettie Watkins, Jennie Crain and Wilford J. Crain.

Q. Is that your signature upon that paper?
A. Yes, sir.
Q. And upon this one?
A. Yes, sir.
Q. Do you remember when you signed that paper or before whom?
A. I don't remember now.
Q. Well, do you remember before whom?
A. Yes, sir.
Q. Whom was it before?
A. Biggs.

Mr. HENEY: We will offer those two papers in evidence—testimony of witness upon final proof of Watkins,—testimony of Crain upon the final proof of Watkins.

Mr. BENNETT: We object to that as incompetent, hearsay and immaterial.

Mr. HENEY: We don't care anything about what is in here except the fact of showing that Crain was a witness upon the final proof of Watkins.

Mr. BENNETT: I don't object to that fact.

Mr. HENEY: Then that fact may appear without the papers themselves going in; and that the certificate is made by Biggs, of its having been taken before him on the 8th day of December, 1902. I don't care for anything, Judge Bennett, except the fact that Biggs certified that testimony was taken before him on the 8th day of December, 1902.

Mr. BENNETT: Well, if you want that you better put it all in subject to our objection. We object to each paper as incom-
352 petent and immaterial.

Mr. HENEY: Well, there might be some part of it that would be incompetent for some reason, so I don't offer it all.

COURT: This present witness was one of the witnesses?

Mr. HENEY: Upon the final proof of Watkins. And I want to prove the fact he was a witness. I don't care what he swore to, but the fact that he was a witness and the fact that Biggs put his certificate to the testimony as of date September 8th, 1902.

Mr. BENNETT: I don't suppose they can do that, your Honor, without putting in the whole paper.

Mr. HENEY: Well, if they want the whole paper in it can all go in. Do you, Mr. Bennett?

Mr. BENNETT: We object to the whole paper upon the ground that it is incompetent, if the whole paper is offered; and if they offer part of it we object upon the ground that that part is incompetent and that they cannot offer part of a paper without all.

COURT: They can offer it for the purpose of proving the facts that he stated. If you want the whole paper you can use it.

Mr. HENEY: We will offer these two papers for the purpose of showing, and solely for the purpose of showing, that Wilford J. Crain did appear as a witness for John S. Watkins on the making of the final proof before M. R. Biggs, United States Commissioner of the District of Oregon, and that Biggs certified to the testimony given by Crain as having been given before him on the 8th day of December, 1902, at Prineville, Oregon.

Mr. BENNETT: It is our claim, your Honor, that if the paper is in for one purpose, it is in for all purposes.

Mr. HENEY: We have no objections to their using the whole paper.

353 COURT: I simply hold they are admissible for the purpose for which they are offered; and if you desire to use them of course you can on cross-examination.

Mr. BENNETT: We take an exception to the ruling of the court permitting the papers to go in at all, to each paper as to each of the defendants; and we except to the ruling of the Court permitting the papers to go in at all, to each paper as to each of the defendants; and we except to the ruling of the Court that it may go in for one purpose.

Q. Do you remember the occasion of your going before Biggs as a witness upon the final proof of John S. Watkins? Do you remember the circumstance of your going there?

A. Yes, sir.

Q. Who all went with you and where did you go from? Where did you start from and who went with you? Where were you living at the time?

A. I ain't sure; but I think I was living with Watkins at the time.

Q. And where was that from Prineville?

A. That is two miles east.

Q. Now who went in with you? Do you remember the occasion of going and who was along?

A. Well, I think Watkins and his wife and me and my wife, if I remember right.

Q. Now, when you got in there, do you remember seeing anybody else there at Biggs' office?

A. George Gaylord was there.

Q. Did you see Gaylord act as a witness there?

A. Yes, sir.

Q. Have you any way of fixing the day other than the date upon the relinquishment—the day upon which you relinquished?

354 A. Well, it was the same day that we was to make final proof.

Q. And who besides yourself did you see relinquish, if anyone, on that day sign a relinquishment?

Mr. BENNETT: We are willing to admit that these people relinquished on that day, if you are willing to let it stand as a cancelled fact that they relinquished on the 8th day of December.

Mr. HENEY: All there before Biggs?

Mr. BENNETT: Yes, before Biggs; that is, both Gaylord and himself.

Mr. HENEY: And Mrs. Watkins and Mrs. Crain?

Mr. BENNETT: We are willing to admit that all those relinquishments were made on the date they bear.

Q. On what day with reference to the time you were before Biggs to relinquish, and to act as a witness, on what day did that conversation take place in Gesner's office when Williamson was present and Gaylord?

Mr. BENNETT: I think that matter has all been fully gone into, your Honor.

A. The same day.

Mr. BENNETT: He stated it was the same day.

Mr. HENEY: Now you have asked him about a check and I am coming to that.

Q. Now, then, upon what day with reference to that did you receive the check?

A. The same day.

Q. For the $19?

A. On the same day.

Q. That is your best recollection, is it?

A. Yes, sir.

Q. What do you say as to your best recollection as to
355 whether you cashed it or not on that same day?

A. Well, I don't remember in regard to that. I might have cashed it the same day and might not. I couldn't say.

Q. Have you examined the date on this check?

A. Yes, sir.

Q. What is the date on that check?

A. December 11th.

Q. Did you notice that at the time? Or was that date on there when you received it?

A. I couldn't say. I don't remember.

Q. Can you account for that in any way.

A. Well, I think the check is dated wrong. I am satisfied the check is dated wrong.

Mr. HENEY: We will ask the other side to produce the stub-book, containing the stubs of the checks for Wilford J. Crain and Gaylord and also to produce the check given to Gaylord. I understand the defendants can not be required to produce any evidence against themselves, but Wigmore on Evidence lays it down as a rule that if secondary evidence is to be offered in regard to a matter even as to a defendant, that a demand for the production should first be made.

Mr. BENNETT: I will say, your Honor, that we object to the notice given at this time. If they wanted this they should have given us notice at some prior time so as to have given us an opportunity to have had the stub-books here.

Q. Was this check ever shown to you before, at either one of the other two trials?
A. No, sir.

Mr. BENNETT: So far as the other check is concerned we will produce that at the proper time, your Honor; but the stub-book
356 we haven't here and we object to the notice in regard to that matter.
Mr. HENEY: My reason for giving notice is so that you won't have any excuse for not having it here before the end of this trial.
COURT: You might take time to see if you have got it, Judge.
Mr. BENNETT: If we can get the stub-book here we will get it, if there is one in existence. And we will produce the other check.
Mr. HENEY: We would like you also to produce the check for $19 that was paid on December 6th and the one for $19 paid on December 13th. I don't know whom they were drawn to.
Mr. BENNETT: I don't know whether we have them or not.

Witness excused.

357 WILFORD CRAIN, recalled on part of the Government, testified.

Direct examination.

By Mr. HENEY:

Q. Do you remember when it was you started to come down here to this trial, and where you started from?
A. Yes, sir.
Q. Where and when?
A. I started from John Watkins' place on Wednesday, the 16th day of August.
Q. With whom?
A. With Watkins and his wife and my wife and Watkins girl.
Q. Have you any memorandum of any kind by which you fix the date or which helps you to fix the date?
A. Yes, sir.
Q. Is that it? (showing the witness a paper).
A. Yes, sir, it is. (Mr. Heney hands the paper to Mr. Bennett.)
Q. When you left the ranch where did you go to from the house where was the first place you stopped?
A. Prineville.
Q. Where in Prineville did you stop?
A. I stopped at Adams' Drug Store.
Q. Did you see where Watkins stopped, if at all?
A. He stopped at Wurzweiler's store.
Q. Did you go on up to the store after stopping at the Drug Store?
A. Came right on behind him.
Q. Did you see anything of George Barnes that morning?
A. No, I didn't.
Q. After stopping at the Drug Store where did you go?
A. We went to Sisters.

358 Q. Did you see what he got at the store?
A. He got a sack of oats.
Q. From Sisters where did you go?
A. Went to Fish Lake the next day.
Q. Then what day did you get here?
A. The 21st, the evening of the 21st.

Cross-examination.

By Mr. HENEY:

Q. Who did you say come over together with you?
A. Watkins and his wife and his girl and my wife and children.
Q. You started at what time?
A. The 16th day of August. We left Watkins' place about eight o'clock in the morning.
Q. How far was it to Prineville?
A. About a mile and a half, in the neighborhood of that.
Q. What time was it you got to Prineville?
A. Between eight and nine o'clock.
Q. You don't think you staid very long in Prineville?
A. No, sir; we did not.
Q. And you would not know what date you started if it was not for this memorandum.
A. Yes, sir; I would.
Q. Is that the way you know?
A. No, sir; it is not the way I know.
Q. What say?
A. No, sir; that is not the only way I know.
Q. You did not need to refresh your memory by this memorandum then?
A. No, sir.
Q. Who was it wrote this writing on the bottom of this memorandum that Crane obtained this due bill the day before he
359 and Watkins left Prineville?
A. Mr. Neuhausen.

Mr. HENEY: Yes, for my information, Judge.

—. ——.

A. I got that paper the day before I left Prineville.
Q. You were in Prineville the day before you left?
A. Yes, sir; I was.
Q. How long were you in there the day before?
A. I was there twice; I was in there in the forenoon and I came out to Watkins' place and back again about two o'clock in the afternoon.
Q. Did you see Watkins in town the day before?
A. I did.
Q. What was he doing?
A. Well, he was bumming around there talking to the boys, one and another; I don't know whether he had any business there or not.
Q. Did you see George Barnes?
A. Not that I remember of.

Q. Did you see Watkins out by the bank building that day?
A. Sir?
Q. Were you out where they were building the new bank, that day? They were building a new bank there at that time, weren't they?
A. Yes, sir.
Q. Were you out where they were building the new bank that day?
A. I was there a few minutes, yes, sir.
Q. Did you see Watkins out there with you?
A. Yes.
Q. *You* say Watkins was out there then?
A. Yes, sir; I went there with him to that place.
Q. Do you remember which one of you staid there the longest, or whether you come away together?
360 A. We came away together.
Q. Do you know whether Watkins was there, back again there, or not?
A. I do not.
Q. What were you out there for? Were you looking at the boys working on the building?
A. I don't remember now. I believe Watkins and me was together and we came along there with—I ain't positive, I believe it was Jess Yancey; and I believe we stopped and talked there a few minutes to some horse buyers in there.
Q. Were you watching the construction of the building?
A. No, we just stopped there a few minutes but wasn't watching the building.
Q. That new bank building in Prineville was quite an interesting thing, wasn't it?
A. Not for me.
Q. Were they cutting stone or did they have big blocks cut out there?
A. I didn't pay any attention to what they had cut.
Q. Did you sit down on a block of stone while you were talking?
A. We might have, and we might have stood up and we might have set down on a plank.
Q. You don't remember about that?
A. No, sir.
Q. Whom were you talking to, Yancey or Atkins?
A. I didn't see no Atkins.
Q. Whom was you talking to, Yancey or Watkins?
A. I was talking to both of them.
Q. What time of day was that?
A. If I remember right it was about eleven o'clock in the forenoon.
361 Q. Do you know whether Watkins was back there again in the afternoon?
A. No, I don't know.
Q. Did he remain in town in the afternoon?
A. Well, I went out to Watkins' ranch and back about two o'clock.
Q. Was he there when you got back?

A. I believe he was in town some place, but I don't remember where he was.

Q. Was he drinking at that time?

A. I don't know whether he was or not, I couldn't say now; he might have been.

Q. That was the day before you started down here, was it?

A. Yes.

Redirect examination.

Q. Did you see George Barnes there at the bank building when you were there?

A. No, sir; I did not.

Recross-examination.

Q. You don't remember who you did see there; you don't remember whether you saw Yancey, do you?

A. Yes, sir, I do.

Q. Was there anybody else there?

A. I saw Watkins there.

Q. Besides Watkins and Yancey did you see anybody else there?

A. Yes, sir.

Q. Who?

A. I don't remember the man's name. He is a horse buyer there; I have forgotten the name.

Excused.

362 JEFF EVANS being called as a witness for the plaintiff and having testified that he was sent by the defendant Biggs to Gesner and that he went to Mr. Gesner and spoke to him about taking a timber claim and asked Gesner if he would let him have the money to prove up on the claim, and that Gesner said he would, and wanted to know of him where he was going to take a claim, and said he would let him have the money if he would take a claim up in that part of the country, that he would let him have the money to prove up on. Q. "What did he say if anything as to whether he would buy it or not?" A. "He said that the claim would be worth $75 more to him after there was a deed to it, than what it would cost me; said it would be worth $500 to him with the deed." Q. "What did you say as to that?" A. "I never said anything, only I said I would take one, I would take a claim, me and my wife; asked him if he would let us both have money to file on a claim and he said he would, and I went up in the timber and got the numbers and filed on it. And the witness having identified his application papers was asked and answered the following question: Q. "Do you remember at the time of swearing to this paper of reading or having read to you this statement in it?" That I do not apply to purchase the land above described on speculation but in good faith to appropriate it to my own exclusive use and benefit, and that I have not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title I may

acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself?" Do you remember any talk about that? A. Well, I think I read the paper myself, and I asked Mr. Biggs how that would be, and he said that as long as I did not make any contract, I could go ahead and prove up on the land. That this that I would get out of it would be for my own benefit."

363 Whereupon the witness was asked the following question, "What did you understand by contract?" To this the defendant objected as incompetent; the language speaks for itself, if he did not understand Mr. Biggs' language it was not the fault of the defendant, but the objection was overruled, to which defendants excepted and their exceptions was allowed, whereupon the witness answered, "Well, I supposed by making a contract that I would have to go into writing, that I would turn this land over to him or he would pay me, as long as I did not sell it, and take something on it, or sign a contract, that it was all right." And thereafter the witness was asked the following question, "Now at the time you signed that paper, what was your intention as to what you would do with the land when you secured a patent to it?" to which the defendants objected upon the same ground as to similar cases hereinbefore stated, but the objection was overruled and defendants excepted and their exception was allowed, thereupon the witness answered, "Well, of course I calculated to sell it, and I supposed that Mr. Gesner would take the land." Q. "For what consideration?" A. Well, I supposed he would give me $500 for it. Q. Was it your intention at the time you signed that to carry that out? A. Well, I intended to take that for it if I could not get anything more out of it. Q. If you could not get anything more out of it? A. Yes. Q. Did you tell him that? A. No, I didn't. Q. You were careful not to, were you? A. Yes. Q. Why were you careful not to? A. Well, I thought at the time maybe that I could get more out of it."

Thereupon the following question was asked, "Why didn't you let him know that?" to which the defendant objected as immaterial and incompetent, but the objection was overruled and the defendants excepted and their exception was allowed, thereupon the witness answered, "Well, I don't exactly—I thought it was a little

364 sum of money to get out of it, but still if I could not get any more, I calculated to take it." Q. "Why didn't you tell him you calculated to try to get more from some one else if you could?" to which there was the same objection and ruling also exception. A. "I didn't think there was any use." Whereupon the following question was asked Q. "Wasn't it because you didn't think he would lend you the money? to which there was the same objection as leading, it was overruled by the Court and the defendants excepted and their exception was allowed.

Whereupon witness answered, "No, I didn't think—well, yes, I guess that that is—that that would be the main thing. I supposed that he wanted the land; I knew that he wanted the land."

The following is all of the testimony of the aforesaid witness Jeff Evans introduced at the trial.

365 JEFF EVANS, sworn on behalf of the plaintiff testified.

Direct examination.

By Mr. HENEY:

Q. Where do you live Mr. Evans?
A. Prineville.
Q. How long have you been living there?
A. Something over thirty years.
Q. How long have you known Mr. Williamson?
A. I have knowed him some time; I could not say——
Q. Oh, about how long?
A. Ever since he has been in Prineville, I don't remember how long now.
Q. What are your relations with them up to the present time, with Williamson and Gesner, friendly or otherwise?
A. How?
Q. Are your relations with them friendly or otherwise?
A. I am friendly with them, always have been; we speak when we meet.
Q. Do you know Mr. Biggs?
A. Yes.
Q. How long have you known him?
A. Well I could not say; I have known Mr. Biggs since he has been in Prineville, the last eight or nine years I think.
Q. Are your relations with him friendly or otherwise?
A. I am friendly with him.
Q. Did you file on a timber claim in 1902?
A. Yes.
Q. Who, if anybody, first spoke to you about it; just tell the jury all about it?

366 A. Mr. Biggs, said if I wanted to take a timber claim I could take one, that there would be $75 in the claim; that Mr. Gesner would furnish me the money to prove up on it.

Q. What did you say to him?
A. I told him that I would take one. So I went up to Mr. Gesner and spoke to him about it, and asked him of he would let me have the money to prove up on a claim and he said he would, and wanted to know of me where I was going to take a claim. I told him;—well he said he would let me have the money if I would take a claim up in that part of the country; he would let me have the money to prove up on it, and I did.
Q. What did he say if anything, as to whether he would buy it or not?
A. He said that the claim would be worth $75 more to him after there was a deed to it, than what it would cost me; said it would be worth $500 to him with the deed.
Q. What did you say as to that?
A. I never said anything, only I said I would take one, I would take a claim, me and my wife; asked him if he would let us both have money to file on a claim and he said he would, me and my wife both.

Q. What was the next thing you did?
A. I went up in the timber and got the numbers and filed on it.
Q. Whom did you find up there; just tell all that happened up there?
A. Well I went up there in the timber and found Mr. Williamson and Mr. Gesner, and Mr. Graves and Mr. Wakefield up there.
Q. Any others?
367 A. I believe not.
Q. Who was with you beside your wife?
A. No one only my wife and some of my children.
Q. What talk did you have up there; what was said up there by any of those parties?
A. I asked Mr. Gesner how I would get my numbers, and he told me to go back to town, and he would send the numbers in to Mr. Biggs, and I could file there in Prineville, he would send them back.
Q. Did he tell you to locate any particular piece of land?
A. No sir.
Q. Did you look at any particular piece?
A. No sir not in particular I did not.
Q. You went back to town did you, that same day?
A. The same day I seen him?
Q. Yes?
A. I don't remember whether I got back to town that day or not. I believe though that I did.
Q. How soon after that did you file?
A. Well it was a day or two. I went back home, and he told me at the time that when I came in to Biggs to file and I went in.
Q. When you went in—are these the papers you signed? Did you sign two papers there?
A. Yes sir.
Q. Were you sworn to them?
A. Yes sir.

Mr. HENEY: We will offer these two papers in evidence.
The same are received in evidence and marked Government's Exhibit No. 46 and 46*a*.

368 Q. You will notice these two papers have the letters N.W. 4 written on them and the N.W. 4 has a line striking it out and there is also a change in these figures of the township number of what appears to have been originally written; 15 is changed to 16 and the range number apparently was 19 and it is changed to 18. Were those changes on that paper when you were sworn to it?
A. No, sir.
Q. Were you ever sworn to it after the changes were made?
A. No, sir.
Q. Did you ever see it after the changes were made until you saw it in court here?
A. I did not.
Q. Did you authorize anybody to make the changes?
A. I did not.
Q. The same thing appears on both of them?

A. I knew nothing about it until I seen it here in court.

Q. Did anybody tell you after the changes had been made that any changes had been made in them?

A. No, sir.

Q. Do you remember having any talk with Gesner or Biggs in regards to it afterwards?

A. No, sir.

Q. Do you know where exactly, the piece described by the letters that are stricken out is?

A. No, sir.

Q. Do you know where exactly, the piece described by the letters now in there is?

369 A. No, sir.

Q. I hand you a paper dated August 2, 1902, signed M. R. Biggs——

Mr. HENEY: The signature on this paper is admitted, is it?

Mr. BENNETT: That is all right.

Q. (Continued:)—bearing the signature of M. R. Biggs. Was that letter ever shown to you before it was shown to you here in Court?

A. No, sir.

Q. Did Biggs ever talk to you about what was in this letter, prior to this term of court?

A. No, sir.

Mr. HENEY: We will offer this letter in evidence, at this time, and I will read it.

"PRINEVILLE, OREGON, 8–2–02–.

Honorable Jap P. Lucas, The Dalles, Oregon.

DEAR SIR: Please change Adolph Kotzman's papers to call for the S.E. 4 Sec. 8, T. 15 S.R. 19 E. W. M.

Also Jefferson D. Evans to the W. 2 of N.E. 4, and W. 2 of S.E. 4, Sec. 2 T. 16 S.R. 18, E. W. M. If you will kindly change the papers it will save a great deal of time, and it is at the request of the said parties. Will you do this for them?

Yours most respectfully, M. R. BIGGS."

Q. Did you request Biggs to make that change, to have that change made?

A. No, sir.

370 Q. Do you remember, at the time of swearing to this paper, of reading or having read to you this statement in it? "That I do not apply to purchase the land above described on speculation but in good faith to appropriate it to my own exclusive use and benefit, and that I have not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself?" Do you remember any talk about that?

A. Well I think I read the paper myself, and I asked Mr. Biggs

how that would be and he said that as long as I did not make any contract I could go ahead and prove up on the land. That this that I would get out of it would be for my own benefit.

Q. What did you understand by contract?

Mr. BENNETT: I object to that as incompetent; the language speaks for itself. If he did not understand Mr. Biggs' language it is not our fault.

Objection overruled. Defendants except.

Q. What did you understand then by the word contract?

A. Well I supposed by making a contract that I would have to go into writing, that I would turn this land over to him or he would pay me, as long as I did not sell it and take something on it, or sign a contract, that it was all right.

Q. Did Biggs say anything about that to you, as to his idea?

A. Yes, sir, he said that a man could prove up on a piece of land that way all right; it was all right as long as he hadn't made

371 any agreement; and the way I understood it was that a man would have to go in writing.

Q. Did he say anything about writing, himself?

A. No—Well yes, he said that a man would have to go into writing or a contract.

Q. Did you say for, or did you say or contract?

A. For a contract.

Q. Now at the time you signed that paper what was your intent as to what you would do with the land when you secured a patent to it?

A. Well of course I calculated to sell it, and I supposed that Mr. Gesner would take the land.

Q. For what consideration?

A. Well I supposed he would give me $500 for it.

Q. Was it your intention at the time you signed that to carry that out?

A. Well I intended to take that for it if I could not get anything more out of it.

Q. If you could not get anything more out of it?

A. Yes.

Q. Did you tell him that?

A. No I didn't.

Q. You were careful not to were you?

A. Yes.

Q. Why were you careful not to?

A. Well I thought at the time maybe that I could get more out of it.

Q. Why didn't you let him know that?

372 Objected to as immaterial and incompetent.

The COURT: He can answer that; I think that is important testimony as coming from this witness, since he seemed to have a mental reservation in dealing with the defendant.

Defendants except.

Q. Why didn't you let him know it?

A. Well I don't know exactly—I thought it was a little sum of money to get out of it, but still if I could not get any more, I calculated to take it.

Q. Why didn't you tell him you calculated to try to get more from some one else if you could?

Same objection.
Objection overruled.
Defendants except.

A. I didn't think there was any use.

Q. Wasn't it because you didn't think he would lend you the money?

Same objection as leading.
Overruled.
Defendants except.

A. No I didn't think—well yes I guess that that is—that that would be the main thing; I supposed that he wanted the land; I knew that he wanted the land.

373 Q. Did he say anything to you about what he wanted it for?

A. No.

Q. Did Biggs say anything to you about what Gesner wanted the land for?

A. No I don't believe he did.

Q. Did you prove up?

A. I did.

Q. Did you see the notice of publication of your intention to make final proof?

A. I seen it in the paper.

Q. Is that a copy of the notice?

A. Yes sir.

Mr. HENEY: We will offer this proof of affidavit of publication in evidence for the purpose of showing before whom the proof was advertised to be made, that it was to be made before Biggs, at his office in Prineville.

Objected to as incompetent and immaterial as to each of the defendants.

Mr. HENEY: I have not offered proof yet, I could call Mr. Fogle to prove that that was the particular piece published and the time of the publication, and perhaps I would, have to do this if you object to it as incompetent on the ground of the absence of that proof.

Mr. BENNETT: No, I don't object to it on that ground. I object to it on the ground that it is generally incompetent. You may

374 consider that it is a copy.

Mr. HENEY: Yes we only want the facts in regard to the notice being published that it was to be taken before Biggs on the 2nd day of January, 1903, at his office in Prineville.

Mr. BENNETT: That may be admitted that it was published to make final proof before Biggs on the day you have indicated.

Q. Mr. Evans, is that your signature to that paper?
A. Yes.
Q. And to this one?
A. Yes.
Q. Did you go to the office of Biggs on the day fixed by the notice of publication of intention to make proof?
A. I went to the office, but Mr. Biggs was not there.
Q. Who, if anybody, did you find there?
A. Mr. Boggs.
Q. While you were there were your answers taken down to those questions?
A. Yes sir.
Q. By whom?
A. By Mr. Boggs.
Q. And after that did you go before anyone else to swear to it?
A. Yes.
Q. Before whom?
A. Johnnie Smith.
375 Q. Who was Johnnie Smith?
A. The County Clerk.
Q. Do you remember as to whether he swore you or not?
A. Yes sir.
Q. Was anyone else along? Do you remember who your witnesses were?
A. It was Henry Beard and Ernest Starr, I believe.
Q. In that connection, to show that they did appear as witnesses for him and solely for that purpose and that they swore to these papers before J. H. Smith as County Clerk, we will offer the testimony of the witnesses, Ernest C. Starr and Henry C. Beard. You do not raise any question as to the signature of A. J. Smith?

Mr. BENNETT: No, that may be admitted that it is the signature of J. J. Smith, subject of course, to our other objection; but we object on the part of each of the defendants to each of these papers separately and to all of them together upon the ground that each and all are incompetent and immaterial and hearsay as to these defendants and in no way binding on the defendants.

Mr. HENEY: There is one claim in regard to this testimony of the claimant which I think I should call your Honor's attention to, I do not know whether counsel for the defendants have noticed it or not, I never noticed it before myself. It is not signed by them or any other officer certifying that the claimant testified. It is blank; the indictment charges them with conspiracy to suborn and testify falsely before Biggs and I think upon the whole, I will withdraw that paper.

376 Q. Do you know whether you went over that claim that is described in that sworn statement?
A. No I don't.

Q. Did your wife sign a sworn statement or application before Biggs at the same time you did? Is that her signature on each of those papers?
A. Yes sir.

Mr. HENEY: We will offer these papers in evidence. The same marked Defendant's exhibit No. 48.

Q. Did you repeat to her what Mr. Biggs had said to you in regard to filing before she filed; that is what he had said about the terms?
A. Yes sir.
Q. Did your wife make final proof?
A. No sir.
Q. Did you have any talk with Dr. Gesner or Biggs in regard to whether she should do so or not?
A. I got a letter from Mr. Gesner that——
Q. What did you do with the letter?
A. I don't know what I have done with it; I have got it misplaced some place.
Q. Have you looked for it?
A. Yes.
Q. Could you find it?
A. No sir. I showed it to Mr. Neuhausen when he was in Prineville and afterwards I got it misplaced.
Q. What was the substance of the letter?
A. He said that my wife had better relinquish because it was not safe to prove up.
377 Q. Did he say that it was not safe?
A. Well he said there was danger of getting in trouble with the Government.
Q. Was that in the letter?
A. I believe that it was, I could not exactly say, but I think that that was; anyhow we was liable to get into trouble over it, that it was not safe to prove up.
Q. Did you show that letter to your wife?
A. Yes sir.
Q. And then did she relinquish after?
A. Yes sir.
Q. Is that her signature upon that paper?
A. Yes, sir.

Mr. HENEY: We will offer that relinquishment in evidence. Same is received and marked Government's Exhibit 49.

Q. What talk if any, did you have—did you pay your filing fees and those of your wife?
A. No sir.
Q. Who paid them?
A. Mr. Gesner, I suppose, I think; he said he would.
Q. What talk did you have with him if any?
A. He said he would pay it all, he would furnish me the money; that he would pay the filing fees and the rest of it.

Q. Did you give any note for these filing fees?
A. No sir.
Q. At the time of making final proof did you handle the money?
A. No sir.
378 Q. Did you have any talk with Biggs about the money at the time of making final proof?
A. Yes sir, I asked him how it would be about the money; he said that was all right, that he would fix that.
379 Q. What if anything was said at that time about giving a mortgage?
A. There was nothing said about giving a mortgage.
Q. Or a note?
A. Nothing.
Q. Do you remember of executing one?
A. No sir I don't.
Q. Then if you did execute one you don't remember?
A. I know nothing about it. All I know about it the note being shown to me here.
Q. The note was shown to you here on the first trial?
A. Yes.
Q. Who produced it?
A. Well, I think Mr. Biggs give it to Mr. Bennett. I don't remember whether you showed it to me, or Mr. Bennett over there. Anyhow, the note was shown to me here.
Q. Is this the note?
A. Yes sir.
Q. That is your signature is it?
A. It looks awfully like my signature; I think it is.
Q. Had you seen that note from the time you signed it, if you did sign it, from that time, until you saw it here in court at the first trial?
A. I never knew anything about it until it was shown to me here on the stand.
Q. You got a check back from the Land Office, didn't you?
A. Yes sir.
Q. Is that it?
A. Yes.
Q. What did you do with that check when you got it back?
A. I taken it back to Mr. Biggs' office and gave it to him.
380 Q. And endorsed it at that time?
A. Yes sir.
Q. At the time you gave him that check did you have any talk with him as to whether you had given a note or mortgage or not and if so, what was the conversation?
A. When I gave him the check I says to Mr. Biggs, "Mr. Biggs, I says, there is no note against me, is there?" He says, "No there isn't. Some we ask for notes and some we didn't, but you are one among them that we didn't ask for any note."
Q. After that at any time up to the time this note was shown to you when you were on the witness stand did he ever say any thing to you about the note?
A. No sir.

Mr. HENEY: We will offer the check in evidence and the note. The note is for $426.10 dated January 10, 1903. "On or before one year after date without grace I promise to pay to the order of Dr. V. Gesner four hundred and twenty six dollars and ten cents, for value received, with interest after — at the rate of — per cent. per — until paid, principal and interest payable in U. S. Gold coin at Prineville, Oregon. And in case suit or action is instituted to collect this note or any portion thereof I promise to pay such sum as the court may adjudge reasonable as attorney's fee in said suit or action." (Signed) Jeff D. Evans."

Q. The check is for $410. from Anne M. Lange, Receiver of the Land Office.

The note was marked plaintiff's exhibit No. 50 and the check plaintiff exhibit No. 51.

Q. Did you ever secure a patent for that land?

A. No, sir, I never got no patent.

Q. At the time you received the check back did you re-
381 ceive a letter similar to that one (Exhibit 33)?

A. Yes sir.

Q. You did receive such a letter?

A. Yes.

Mr. HENEY: That is the letter accompanying the return of the money, or rather stating that the return of the money is authorized by the General Land Office and does not in any way jeopardize the claimant's right to the land, etc.

Q. Did you have the money with which to prove up on this land at the time you filed?

A. No sir, I did not.

Q. What were you working at?

A. Teaming mostly; I have a place there; working on that a little but mostly teaming.

Q. You had a little ranch at that time?

A. Yes sir.

Q. Did you have your own team?

A. Yes sir.

Q. Doing odd jobs with it?

A. Yes sir.

Q. Did you have any money saved up?

A. I did not.

Q. Do you know special agent Neuhausen who is sitting here?

A. Yes sir.

Q. Do you remember of his being in Prineville, Did you see him in April or May 1904?

A. Yes sir.

Q. While he was there did you receive any letter from Dr. Gesner?

A. Yes, I got a letter from Dr. Gesner about the time that he came there.

Q. What became of that letter?

382 A. It is misplaced some place; I don't know.

Q. Have you looked for it?

A. Yes.
Q. Could not find it?
A. No sir.
Q. What was the substance of that letter?
A. For me not to prove up because it was not safe.
Q. Well you had already proved up then?
A. Well I got this letter just before time to prove up.
Q. Oh no, this is 1904.

Mr. BENNETT: I object to that. Counsel has no right to determine it.

Q. Did you get more than one letter from Dr. Gesner? How did your wife come to relinquish?
A. Well on account of a letter.
Q. That was before you made final proof was it not?
A. Yes.
Q. Now after you had made final proof and at the time Neuhausen was up there in 1904, more than one year after this, did you receive any letter from Gesner? After you had got your money back from the land office?
A. No I know that I got a letter from Mr. Gesner saying that I had better relinquish because it was not safe.
Q. Now when was that? You never got such a letter before you proved up? What did the first letter from Gesner relate to what was it about?
A. Well my wife had better relinquish.
Q. That was for your wife to relinquish?
A. Yes sir.
Q. Did he tell you to relinquish at that time?
A. No he did not. Then I got another letter that I had better relinquish.
383 Q. When was that with reference to Mr. Neuhausen's visit up there.
A. Well I remember it was just before Mr. Neuhausen came there. I showed it to Mr. Neuhausen.
Q. You showed it to him when he came there?
A. Yes, sir, I taken the letter and showed it to him.
Q. In that letter in which he said you had better relinquish do you remember anything else that was said in the letter?
A. Well, I remember of him saying that I had better relinquish because it was not safe, I can't remember now; I have got bothered on that so that I don't remember exactly what it was. But I remember of showing the letter to Mr. Neuhausen.
Q. Now before you showed any letter to Mr. Neuhausen did you have any talk with Dr. Gesner in Prineville?
A. Yes, I believe that I met him down on the street one day and he asked me if I got a letter from him and I told him that I did. And he says where is it at? I says "It is at home." He says, "Well you destroy that, burn it." So when I got this letter from—when the time came that Mr. Neuhausen told me to meet him at Mr.

Poindexter's I taken the letter with me and showed it to Mr. Neuhausen.

Q. What was Mr. Neuhausen doing there at that time?

A. Claimed to be a special land agent.

Q. Investigating these claims?

A. Yes.

Cross-examination.

By Mr. BENNETT:

Q. Did you show Neuhausen two letters or one?

A. I could not say now for certain. I have got tangled up in that letter business. I may be wrong. I know that I showed Mr. Neuhausen a letter that I got for me to relinquish, and I am
384 a little afraid that I have got tangled up in that; I don't remember when I come to think of getting the two letters, whether or not I showed him the letter that my wife got or not. I would not say now positively, but I know that I showed him the one that I got for me to relinquish.

Q. Well are you sure you got two letters?

A. Yes, sir.

Q. Sure you got two letters?

A. Yes, sir.

Q. But you don't remember of showing but one to Neuhausen?

A. Well right at the time I would not say positive.

Q. Now it has been a long time ago. Is your memory somewhat confused as to what did take place at that time, three years ago?

A. I remember some things taking place.

Q. You remember some things better than others?

A. Yes, I think so.

Q. Some things you remember pretty clearly and some things you get mixed about?

A. There may be some things I may forget sometimes, but there are some things I remember.

Q. Right in that connection, on the matter of your memory about this note. You say you don't remember whether you signed a note or not?

A. I know that I did not sign a note, knowing it. If I signed a note I didn't know what I was signing.

Q. You are perfectly sure you never signed a note?

A. I perfectly know that I did not know it when I signed it.

Q. You are perfectly sure you did not sign the note knowing what it was?

A. Yes, sir, I am sure of that, because I would not have forgotten that.

385 Q. How long have you been positive about that?

A. Eyer since I signed that note.

Q. Was you positive you had never signed any note before you saw this at all? You have always been positive of it, have you?

A. I have always been—yes, sir, that I never signed the note. If I signed a note I didn't know what I was signing.

Q. If you were positive you never signed a note, why did you ask Mr. Biggs when you took the check back whether you had given a note or not?

A. Well, I don't know what made me.

Q. Now don't you know it was because you was not positive? That you did not remember whether you had signed a note or not?

A. Well I knew that I had not signed the note.

Q. Why did you ask him then, if you knew yourself, that you had not signed any?

A. Well, I can't answer that question, and tell you why; but I knew I was giving him his money back;——

Q. Well didn't you have a lingering suspicion in your mind at that time that you had signed a note?

A. I did not, sir.

Q. And you asked Biggs so as to clear that up?

A. No, sir, I did not.

Q. You claim you knew positively at that time that you had not signed the note, although you were asking Biggs whether you had or not?

A. I knew if I had ever signed a note like that I would not have forgotten it.

Q. Do you deny that being your signature?

A. No, sir, I can't deny that signature; it looks like my signature.

Q. Is it your signature?

A. I think it is.

386 Q. You think you wrote that?

A. Yes sir I think I did, but I think when I wrote it I did not know what I was writing it on.

Q. I wish you would read that over; read it out loud if you will?

A. "One day—after—"Well, do I have to read that out loud?

Mr. HENEY: If you can I would like to have you.

A. Well I am a very poor reader; I would rather not read it out.

Mr. HENEY: Mr. Bennett does not always like the inflections that I give in reading, and I suppose he would rather hear you read it.

A. Well I would rather not read it.

(Mr. BENNETT resuming:)

Q. What say?

A. I don't care to read it out loud.

Q. Read it over to yourself?

A. Well I have.

Q. Read it over have you?

A. Yes.

Q. Read it all over?

A. Yes.

Q. Now do you think, Mr. Evans, that you could have written that signature on that line as it is written without knowing what you were signing?

A. Well yes, I think it could be done.

Q. How could you do it?

A. Well there is different ways that a man could do it.

Q. Tell us some way in which you think it could have been done?

A. It could have been put under another piece of paper I think.

Q. What say?

A. I think it could have been put under a piece of paper;

387 folded up so that I didn't know it. I was signing some papers there and I supposed they was all right and didn't think anything about anything like that.

Q. Do you think if anybody had put down a paper to you and had writing on it all covered up so you could not see what it was, you would have signed it?

A. Well I think that I have all right.

Q. You think you have signed papers that way?

A. I think I signed that one that way.

Q. You think when you signed this one it was covered up by another paper?

A. Well it was fixed in some way that I did not know what I was signing; I know that.

Q. You swear to that positively do you?

A. That I did not know I was signing a note?

Q. That it was fixed in some way that you didn't know what you were signing?

A. Well I swear that, when I signed that I didn't know it; yes I do.

Q. You didn't know you were signing a note at all?

A. No sir.

Q. Of any kind?

A. Of any kind.

Whereupon a recess was taken until 2 o'clock this afternoon, September 13th, 1905.

388 Afternoon Session 2 o'clock, Sept. 13.

Mr. BENNETT: I suppose it may be understood, Mr. Heney, that the marks on this note of Evans, United States exhibit 66 and Exhibit A, etc., are the exhibit marks in this case?

Mr. HENEY: Yes.

Q. This note that you denied signing Mr. Evans, is dated at just the time when you made final proof, isn't it, or just about that time, January 12th, 1903. That is about the time you made final proof?

Mr. HENEY: I know you did not intend to mislead the witness, but he does not deny signing the note, you know. You did not mean that did you?

Mr. BENNETT: Well, I take it for a practical denial that he signed it; however I will make that clear.

Q. The date then of January 12th, 1903, which is on the note, you deny signing, knowing it to be the paper that it is, is about the date when you proved up isn't it?

A. I think so.

Q. What say?
A. Yes.
Q. And the amount of the note, $426.10 is just the amount of your purchase price and team isn't it?
A. Yes.
Q. Then the note is for just the amount of money that you obtained from Dr. Gesner?
A. Yes.
Q. And have you signed any papers for any of these defendants since that time?
A. Which do you mean the Government?
389 Q. For any of these defendants, Mr. Williamson, or Gesner or Biggs?
A. No I haven't signed any papers for them.
Q. You haven't signed any papers of any kind for them since that time?
A. No sir.
Q. Now you claim that you did not have any talk with Biggs about changing your entries to that land?
A. No sir, I did not.
Q. Are you any more sure about that than that you did not sign this note, knowing that it was a note?
A. I know that I had no talk with him about that.
Q. Are you any more certain of the one than of the other?
A. I know that I had no talk with him.
Q. Are you any more certain of that than you are about the signature of the note?
A. About the signature?
Q. Yes about the signing of the note?
A. Why I know that if I signed that note I knew nothing about it.
Q. About whether it was a note?
A. Yes.
Q. And you are just as certain about that as you are about the matter of not talking with Biggs about the changing of your entry?
A. Yes sir.
Q. If you are mistaken in one you are just as liable to be mistaken in the other?
A. I think so.
Q. Now, before you saw Mr. Biggs, you had been figuring
390 on taking a timber claim up there hadn't you?
A. Yes sir.
Q. Counsel has asked you something about your poverty and about just what you owned and so on.
Q. Your team was what kind of a team?
A. Oh I have a small team.
Q. Two horses or six or eight horses team?
A. Six.
Q. You had a six horse team?
A. Yes.
Q. A six horse freight team?
A. Yes.

Q. How many wagons made up your team?
A. Two.
Q. Six horses and two wagons?
A. Yes sir.
Q. You were engaged in freighting from Shaniko to Prineville?
A. Yes sir.
Q. And living on your ranch in the meanwhile?
A. Yes.
Q. You were a poor man?
A. Yes.
Q. But you had lived in that country how long?
A. I have lived in that country over thirty years.
Q. Then when you came there it was a very new country?
A. Yes sir.
Q. You also had some other horses as a matter of fact?
A. Yes.
Q. Quite a bunch, hadn't you?
A. Oh, I have got a few.
391 Q. You did not have the ready money without borrowing it at that time to prove up on the timber claim?
A. No sir; I did not.
Q. So you had been figuring around as to where you could borrow the money to prove up on a claim, hadn't you?
A. Yes sir.
Q. And you went to Mr. Biggs, didn't you, with that in view, to see if you could find out where you could borrow the money to take a timber claim?
A. Yes.
Q. Now, you asked Mr. Biggs if he knew of a place where you could borrow money to file on a timber claim, didn't you?
A. Yes sir.
Q. And he told you he thought you could get money from Dr. Gesner?
A. He told me I could get money from Dr. Gesner.
Q. He told you, you could get money from Dr. Gesner?
A. Yes sir.
Q. And he told you he thought you could do better by taking a claim up there than anywhere else didn't he?
A. Yes sir.
Q. Did he tell you to go and see Gesner and see if you could make any arrangements with him, or did you go upon your own motion?
A. Well, he told me that Gesner would loan me the money. Whether he wanted me to go and see him, anyhow he told me that Gesner would let me have the money and I went and seen Gesner.
Q. You went and saw him to see what arrangement you could make with him. Well, did you ask Gesner if he would let you have the money to prove up on a timber claim?
392 A. Yes sir.
Q. And he wanted to know where you wanted to take one, didn't he?
A. Yes, sir.

Q. And you told him you would like to have one where you could realize something out of it?

A. He asked me where I was calculating to take a claim, and I told him up in the Horse Heaven country, and he said if I wanted,——

Q. Didn't you prefer to tell him that you would like to take one where you could realize something out of it?

A. Well, I don't know. I disremember now exactly what I did say, but I think that I told him I would take a claim if I could realize anything out of it.

Q. Didn't you tell him you thought maybe you would take one out at Horse Heaven country?

A. I told him I calculated to if I could get the money.

Q. And he told you if you wanted to take one up there he would let you have the money to prove up on?

A. He did.

Q. Then, you asked on what terms he would let you have the money, didn't you?

A. Yes sir.

Q. You asked him that, and he said he would let you have the money without interest, provided you would let him have the grass on the claim as long as you held the claim, or as long as you kept the money?

A. Yes sir.

Q. Now, he said that the claim would be worth at least $75 more than it would cost you to get it to prove up on it did he?

393 A. He did; he said it was worth that much more to him.

Q. But he did not say he would buy it?

A. No, he did not say he would buy it. He said it would be worth $75 more to him after the patent.

Q. If you wanted to sell it?

A. Yes sir.

Q. And he did not say he would buy it and did not ask you whether you would turn it over to him or not?

A. No sir.

Q. And you never told him anything about that one way or the other?

A. No, I never told him that I would or that I would not.

Q. You never said anything about that one way or the other, either of you?

A. No, only he said it would be worth $75 more to him after that.

Q. That was all that was said in relation to that matter?

A. Yes sir.

Q. He did not ask you to agree to sell it to him, and you did not agree to sell it to him?

A. No, he never asked me to; whether I would or not; only just in that way, he said it was worth $75 more to him after I would get a patent.

Q. If you wanted to sell?

A. Yes sir. I suppose though, that he calculated that I would turn it over to him.

Q. You did not intend to turn it over to him at any such price as that did you?

A. Well I would have turned it over to him when I proved up on it I guess.

Q. If you could not do better?

394 A. Yes, if I could not have done better.

Q. You had no use for the land for yourself; that is, to keep it forever?

A. No sir; I didn't have no use for the land; all I wanted out of it was—all I wanted of the land was to get something out of it, so that I could improve the place I was living on.

Q. You wanted to get the most you could out of it?

A. Yes sir.

Q. You did not have a saw mill?

A. No sir.

Q. You did not ever expect to have one?

A. No sir.

Q. You understood that the money was a loan and that you were to pay the interest and pay him for his favor in letting you have the money by letting him have the use of the grass?

A. Yes sir, that as long as I owned the land, there would be no interest on the money.

Q. You were letting him have the use of the grass to pay for the favor and the use of the money, wasn't you?

A. Yes sir.

Mr. HENEY: Judge Bennett, as a matter of law, is not interest in such a note as that collectable at the legal rate here in Oregon? I am asking for information.

Mr. BENNETT: Well, I never thought about that. I think the law is that after maturity interest would be payable at the legal rate.

Q. But the understanding between you was, as long as you kept the money and let him have the grass, you were not to pay interest?

A. Yes sir.

Q. Now, this talk you had with Gesner about the arrange-

395 ment about the money, whatever it was, was in Prineville, was it?

A. Yes sir.

Q. While you and he were alone together?

A. Yes.

Q. You did not have any talk with him about that matter after you went up to the plant where Williamson and those people were? You did not have any talk with him up there about the arrangement about the money, at all, did you?

A. Well, it seems to me like that when I went to get back, to file, I asked him about the filing money and he said it would be all right, that Biggs would attend to that for the filing.

Q. Who was present then, just you and him?

A. Well, there was the other boys there, but whether they heard

it or not I don't know. He said anyhow, for me to go back there and Biggs would attend to that; he would send the numbers.

Q. You don't know whether anybody heard him say that or not?

A. No I don't.

Q. Well you testified at the second trial of this case that you did not have any talk about that after you went up to the plant didn't you?

A. No more than that, the filing money?

Q. Didn't you testify this way about that? "Q. I believe you testified you arranged with Dr. Gesner up there that he would loan you the money? A. I arranged with him in Prineville that he was to let me have the money to prove up on the claim. Q. That was before you went up there? A. Yes, that was before I went up. Q. You did not have any talk about that after you went up to the plant then? A. No sir."

Did you say that?

396 A. Well the money for proving up, we did not; but the filing money, I didn't have any money to pay for the filing.

Q. Oh yes, you think there was something said about the filing money up there?

A. Yes sir.

Q. But nothing about the money that you were to prove up on?

A. No.

Q. Now when you filed on this land, you expected to sell it when you proved up on it to the man that would give you the most for it, didn't you?

A. Yes sir; I calculated to get out of it what I could.

Q. You calculated to sell it to the man who would give you the most. You expected to get a good deal more than $500 out of it, didn't you?

A. Well I thought the claim would sell for more than that.

Q. And you expected to get more than that out of it, didn't you?

A. Well I didn't know whether I could or not.

Q. You intended to if you could?

A. Yes sir, all I knew that Mr. Gesner told me, that it was worth $75 more to him.

Q. You felt sure you could get that much out of it?

A. Yes.

Q. And might get more?

A. I didn't know at that time but I might.

Q. You expected to get more if you could?

A. I would maybe; I might have a chance to get more.

Q. You expected to get more if you could?

397 A. I would have taken more if I could.

Q. And you expected to get more if you could, didn't you? You expected to get more if you could?

A. Why yes, if I could have got more I would have.

Q. And you went to those parties to inquire in relation to getting a timber claim with that in view?

A. Yes sir.

Q. They did not suggest it to you but you went and suggested it to them?
A. Yes sir; I went to Mr. Biggs in the first place.
Q. And afterwards went to Dr. Gesner?
A. Yes sir.

Redirect examination.

Q. Did you know that Gesner was loaning money on claims up there before you went to Biggs?
A. No sir.
Q. Did you hear anybody say so?
A. No sir.
Q. Did you hear anybody talk about filing up there for him?

Objected to as incompetent, immaterial and hearsay.

Q. What led you to go to Biggs?

Same objection.
Objection overruled. Defendants except.

A. I heard some way that Gesner was letting people have money, and that Biggs was—that a person would have to go and see Biggs, by seeing Biggs they could find out.

Mr. BENNETT: I ask that that be stricken out as incompetent and hearsay.
Objection overruled. Defendants except.

Q. Now then, do you say that you had any idea of selling
398 that claim to anybody else?
A. Well I don't suppose—No, I calculated so far as that goes, I calculated to let Mr. Gesner have it.
Q. You did?
A. Yes, because I was more under obligation to him than to anybody else.
Q. As a matter of fact you did not have any idea whether there was any timber on it at all did you?

Objected to as leading.
Objection overruled. Defendants except.

Q. You did not consider the question of whether you could sell it to anybody else or not?
A. No sir.

Mr. BENNETT: I object to that, and I wish the witness would wait until I could get my objection noted. I object to that as leading.
Objection overruled. Defendants except.

Q. Would you have taken up the claim at all, if Gesner had not told you what it would be worth to him?
A. No sir I would not.

Mr. BENNETT: I object to that as incompetent and immaterial and calling for a conclusion of the witness and not binding on the defendant.
Objection overruled. Defendants except.

Q. Did you tell Gesner he could have the grass or use the range?
A. I did not.
Q. When you got your money back, when you got that check back from the Land Office, did you turn it over to him right away?
399 A. Yes sir; I turned it over to Mr. Biggs.
Q. Did you tell Gesner you wanted to be paid for the range after that, as he was not out any money?
A. No sir.
Q. You didn't have any talk with him about whether you could get anything for the range or not?
A. No sir I did not.
Q. Is he still using it?
A. He is as far as I know.
Q. Has he ever offered to pay you anything for the use of it?
A. No sir.
Q. Have you ever asked him to pay anything for the use of it?
A. No sir.
Q. If you considered that money a loan and that Gesner was having the use of the range for the use of the money, why didn't you keep the money so that whenever you might be called upon in answer to this letter to pay for the land and get you- patent, that you could pay it?
A. Well, I had no use for the money unless I could prove up on the land; and I did not want it; and if I could not get the land or anything for it, I did not want the money and turned it back to him.
Q. If you had put the money in the bank, you could have had interest on it, and the Doctor in return for that, would have had the use of the grass on the land?
A. Well, I considered if I could not get the land, so that I could sell it, I did not want the money. I was taking the land to make something out of it.
Q. Did you ever ask anybody else to buy the land?
A. No sir.
400 Q. Or if they would buy it?
A. No sir.
Q. Now I want to call your attention to some matters. The suggestion was made to you that that note was made at the same time of the final proof, and I think you are entitled to know those dates to see if it will refresh your memory Your final proof is dated January 2.

Mr. BENNETT: I don't know that Mr. Heney; I assumed it was made the 12th.

Q. The note is dated January 12 and the final proof shows Biggs was away. You remember he was away, do you?
A. Yes sir.
Q. Now, do you recollect as to whether after he came back——
A. No, I never signed any note after he came back or any paper that I know of, I know that I did not.
Q. You would have signed the note if he had asked you to?

A. Why certainly, I expected to sign the note but they never asked me to sign a note.

Q. As well as you remember?

A. Yes as well as I remember.

Q. But you evidently did sign a note, didn't you?

A. Yes.

Q. You evidently signed it if it is signed on the day it is dated, ten days after the final proof?

A. Yes, I signed it, but I never signed no paper in there after that time.

Recross examination:

Q. Now you say that after you turned this money back Dr. Gesner never paid you anything for the use of the grass? You didn't
401 know whether you had any right to the land after the money was turned back, did you?

A. Well, I wouldn't have, I don't suppose any right to the land unless I could get a patent to it.

Q. And you never asked anybody else to sell it to them; you were never in a position to try to sell it to anybody were you?

A. No sir.

Q. Do you know whether Dr. Gesner got the use of the grass any more than anybody else in that country after the Government refused to issue patents on the land?

A. No sir; I don't know anything about that.

Q. You don't know whether he got the grass or whether it was turned back into the common range where everybody could use it?

A. No I don't know.

Redirect examination:

Q. Did he ever have any other use of it before than he had after the time, so far as you know?

A. Not so far as I know, no.

Q. Didn't the letter which you received from the Land Office say to you, "The return of this money is authorized by the General Land Office and in no wise jeopardizes your right to the land if your good faith and full compliance with the law are shown on examination of proof. You will be notified promptly when final decision is rendered in Washington D. C. and can forward money to me, if patent is to issue."

Don't you remember that statement?

A. Yes sir.

Q. Didn't you understand from that, that your right was not in jeopardy?

402 A. Yes.

Q. That only an examination was being made as to the *bona fides* of it?

A. Yes sir.

Q. You had your final receipt?

A. Yes.

Q. Didn't you understand that as soon as you got final receipt for it if there was no fraud in the matter you owned the land and could sell it to whom you pleased?
A. Yes sir; that is the way I understood it.

Recross examination:

Q. If you could find anybody that would buy it in that way?
A. Buy it in that way?
Q. With the title in question in the way it was, the Government having returned the money and pending an investigation in relation to the matter such as you say, I say, if you could find anybody who — buy it while the title was in that condition?
A. I would not consider I had any right to sell it in that way.
Q. And you know very well you could not sell it if you wanted to while it was in that condition?
A. No, I did not think that a man could.
Q. That is still under investigation is it?
A. I suppose so.

Mr. HENEY: There was no final receipt; I misled the witness in that respect.

(Mr. HENEY:) You did not get a final receipt did you?
A. No.

Excused.

403 One, HENRY HUDSON being called as a witness for the Government and after having testified to filing upon the land in question, was asked among other things, the question, Q. "What was your intention as to what you would do with the land at the time you signed that?" To which the defendants objected as incompetent and immaterial and in no way binding upon the defendants, but the objection was overruled and the defendants excepted and their exception was allowed. Whereupon the witness answered, A. "Well, I was going to sell it of course, if I could; I took it up for speculation. Q. Sell it to whom? A. Well, I was going to sell it to the highest bidder. I was calculating to make a thousand dollars out of it if I could, and if I couldn't I would let it go to Dr. Gesner. Q. What did you understand at that particular time as to whether you had agreed to sell it to Gesner or not? Mr. Bennett: We object to that your Honor. Objection overruled. Defendants except. A. Well, now I don't know; it was kind of an agreement; a verbal one though.

The following is all of the testimony of the aforesaid witness Henry Hudson introduced at the trial:

404 HENRY HUDSON sworn on part of the Government testified as follows:

Direct examination.

By Mr. HENEY:

Q. Where do you live?
A. Prineville.
Q. How long have you lived here?
A. About 27 years.
Q. How long have you known Mr. Williamson?
A. About that length of time I guess, 26 years or something like that.
Q. Are your relations with him friendly or otherwise?
A. Well, I am not any relation to him.
Q. I mean on what kind of terms were you with him; friendly or otherwise?
A. Well, we were not so exactly particular friends and we are not enemies. We speak to one another when we meet.
Q. Before this case were you particular friends?
A. Oh, yes, we was a little more friendly than we are now I guess.
Q. How long have you known Dr. Gesner?
A. I have known — doctor about the same time I guess; about 26 years I guess.
Q. Were you friendly with him also?
A. Yes sir.
Q. How long have you known Mr. Biggs?
A. I guess about seven or eight years.
Q. Friendly with him before this case?
A. Well I wasn't quite so familiar with him as I was with the doctor and Mr. Williamson, but we wasn't enemies.
Q. You are not on unfriendly terms?
A. Oh, no, not at that time; I don't know what we are now.

405 Q. What business were you in up there?
A. Well, I was ranching and raising a few head of horses.
Q. Did you make a timber filing in 1902?
A. Yes, sir.
Q. Who first spoke to you about making one, if anyone?
A. Dr. Gesner.
Q. What did he say to you?
A. Well, he asked me if I wanted to take up a claim. I told him yes, if I could make some money out of it.
Q. Tell the jury the whole story. Tell the whole conversation, what you can remember of it.
A. Well now I am a poor hand to make a statement; you ask me questions and I can do better.
Q. Well, after you said you would if you could make something out of it what did he say?
A. Well, he told me to take up a claim and it was worth $500 to him after I got a deed, if I could make a deed to it.
Q. Was anything said about where it should be taken?

A. Yes, sir.
Q. What did he say?
A. He pointed out on a little plat which he had made himself, I guess, pointed out section 28, the N.E. quarter.
Q. Was that the first talk you had with him about it?
A. I think it was, sir.
Q. Was anyone else present?
A. Well, there was nobody present, only Mr. Williamson. He sat on the sidewalk about the distance this table is long; was sitting on the sidewalk.

406 Q. How did you come to get into this conversation with Gesner?

A. Well, there was so many taking up claims.
Q. Was you sitting there with him?
A. No, I was around on the other side of the street.
Q. How did you come to get on that side of the street?
A. He called me over.
Q. Then he showed you this plat, did he?
A. Yes.
Q. What did you say about that?
A. I told him all right, I would take the claim if I could make something out of it.
Q. Was anything said as to how much you would make out of it?
A. I think it was said it would be about $75.00 in it, something like that. He told me he could give me $500.00 for the claim if I give him a deed to it.
Q. What was said about who was to furnish the money?
A. Well, he was going to furnish it; I told him I wouldn't furnish a cent.
Q. What did he say?
A. He told me all right, he would do it.
Q. Did he tell you whom to go before to file?
A. Yes.
Q. What did he say about that?
A. He told me to go to Biggs, and he says, he will fix it, or it is fixed, or something to that effect; that he would fix it or it was already fixed, or something.
Q. You went to Biggs, did you?
A. Yes, sir.
Q. When you got there, did you file on a piece?
A. Yes.

407 Q. Did you use the same description that doctor gave you, the numbers he gave you?

A. Yes, sir.
Q. What talk did you have with Biggs?
A. Well, I told him Doc. sent me over to file on that quarter section.
Q. Then did you sign these two papers?
A. Yes, that is my handwriting.
Q. Is this one also?
A. Yes, sir, that is mine too.

Q. Did he swear you to it?

A. Well, now, I don't recollect; I don't think I stuck up my hand to swear to it; I don't believe I did; I wouldn't say positive; but I don't recollect that I did.

Q. At the time you signed it did he ask you for any money? Was anything said about filing fees or anything of that sort?

A. No, I told him Gesner would fix it all about the business. I didn't give a cent anyway; I wasn't out a cent.

Q. Did you have any talk with Biggs then as to what was going to become of the land after you got it?

A. No, I don't think we did.

Q. Did he read this to you, or did you read it to yourself,—"That I do not apply to purchase the land above described on speculation but in good faith to appropriate it to my own exclusive use and benefit, and that I have not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself."

A. Well, everything was going in such a hurry them days I don't recollect whether we read it or not, but he read something I guess he did; I am not sure of it though.

408 Q. Do you remember any talk about it?

A. No, we didn't have any talk.

Q. What was your intention as to what you would do with the land at the time you signed that?

Mr. BENNETT: This all goes in subject to our same general objection, your Honor, and we wish our exception to it.

A. Well, I was going to sell it of course, if I could; I took it up for speculation.

Q. Sell it to whom?

A. Well, I was going to sell it to the highest bidder. I was calculating to make a thousand dollars out of it if I could, and if I couldn't I would let it go to Dr. Gesner.

Q. What did you understand at that particular time as to whether you had agreed to sell it to Gesner or not?

Mr. BENNETT: We object to that your Honor.

Objection overruled. Defendants except.

A. Well, now I don't know; it was kind of an agreement; a verbal one though.

Q. A verbal one?

A. Yes.

Q. And you mean you were going to fall down on the agreement?

Objected to as leading.

Q. Did you think you had a right to sell it to somebody else?

A. Well, I don't know if I had the right or not, but I had the drop on him; I was going to sell it to somebody else if I could get it.

Q. You don't think if you had, it would have been exactly square to the doctor?—did you at the time?

Objected to as leading.
Objection overruled. Defendants except.

A. What was the question?

409 Q. You didn't think if you sold it to anybody else that you would be giving the doctor exactly a square deal, did you?

A. Well, I didn't think it was very honest of me, but at the same time I was going to do it.

Q. After you had signed that, did you make final proof?

A. Yes.

Q. Before making final proof did you have any further talk with the doctor in regard to the matter?

A. No, I don't believe I did.

Q. Whom did you make final proof before?

A. Biggs.

Q. Did you go out to take a look at the land before you filed on it?

A. No, I did not, sir; but then I am acquainted all over that country; I know what it was.

Q. You had herded sheep out in that country?

A. O, yes; I had hunted horses and hunted sheep. I knew every bit of it.

Q. But you did not have in mind did you, what this particular quarter section looked like, so far as timber was concerned, or did you?

Objected to as leading.

Q. What was your recollection in regard to that?

A. O, well, my recollection was, there was a good deal of timber on it. Of course I have been asked to estimate it, but I am no estimator of timber.

Q. At that particular time you were filing, could you recall this particular piece of land as to what it looked like, this particular quarter section you were filing on?

A. Well, I know where it laid; I know I could find it at any time when I wanted to, but of course I couldn't recollect every

410 foot of it right there.

Q. Could you recollect as to whether this particular piece had or did not have timber on it?

A. Oh, yes, there was timber on it; even fir timber; some fir timber, not much.

Q. How much timber do you think there was on it?

A. Well, I can't tell you that; I am no timber cruiser.

Q. How did you get the figures?

A. Which figures?

Q. In the final proof as to how much there was on it?

A. How much timber there was on it?

Q. Yes.

A. Well, I don't know; I guess me and Biggs was talking about

that estimating it among ourselves, if I recollect right, when I proved up.

Q. About how much do you think there is on it?
A. How much do I think there is on it?
Q. How much do you think there is on it?
A. O, Lord, I couldn't tell you.
Q. You haven't any idea?
A. No, sir, I am a poor hand at estimating timber.
Q. Do you think there is over 500,000 feet on it?
A. I don't know.

Objected to as immaterial.

A. I would say yes or no to that; there is quite a little timber on it, but I could not say how much.
Q. Is that your signature upon that paper?
A. Yes, sir.
Q. Is that one yours?
A. Yes, sir.
Q. Do you remember going before Biggs and making final proof?
A. Yes, sir.
411 Q. Are these the papers you signed?
A. Yes. That is my handwriting.

Mr. HENEY: I will offer in evidence first his sworn statement or application; and then we will offer these two papers he has just identified.

Same are admitted subject to the usual objections, and marked respectively plaintiff's exhibit 52 and plaintiff's exhibits 53 and 53*a*.

Q. Was there any water on this piece you took up?
A. Yes, I reckon there is a spring on it; I think there is some water in it.
Q. Would you recognize the place do you think (showing the witness a photograph)?
A. Well, now I couldn't recollect; but you put me up in the timber and I can show it.
Q. At the time you made this final proof and up to that time had you talked with Dr. Gesner any further about the matter?
A. No; we may have talked about it but I don't recollect.
Q. You don't recollect anything?
A. No.
Q. Do you remember this question and answer in your final proof: "Have you sold or transferred your claim to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract in any way or manner with any person whomsoever by which the title you may acquire from the government of the United States, may inure in whole or in part to the benefit of any person except yourself? A. No."
Do you remember that question and answer?

Mr. BENNETT: I suppose our general objection covers this. We make the objection.

A. I don't know; I don't remember.
Q. You don't remember?
A. No.
412 Q. Do you remember *my* talk in regard to it?
A. Yes, sir, I believe we talked some about it.
Q. I mean between you and Biggs at the time you were making this proof was there any talk about it, any talk about your right to do it?
A. No, I don't recollect about that?
Q. In your cross-examination do you remember this question and answer: "Q. How many thousand feet of board measure of lumber do you estimate that there is on this entire tract and what is the stumpage value of the same? A. About two million feet; about 50 cents to 75 cents per thousand feet."
Do you remember that?
A. Was that asked me?
Q. Yes.
A. No they never asked me that that I know of.
Q. Didn't Biggs ask you that and write it down at the time when you were making your final proof?
A. I don't recollect.
Q. You don't recollect.
A. No, sir, I don't recollect anything about that.
Q. Do you *this* remember this question at the time of making your final proof: "What do you expect to do with this land and the timber on it when you get title to it? A. Hold it for my own use?"
A. No, sir, I don't know anything about that; no, I don't know.
Q. You don't remember?
A. No.
Q. Did you intend to hold it for your own use?
A. Well, I intend to hold it for my own use, to make out of it what I could.
Q. You were going to use it by selling it?
A. Why, yes, that was my intention.
413 Q. Do you remember of this question and answer: "Do you know any capitalist or company that is offering to purchase timber land in the vicinity of this entry; if so, who are they, and how did you know them? A. No."
A. Well, I don't know anything about it. I can't remember, Mr. Heney. I found out since these trials, you know, that there is 38 questions in that business, but I know I didn't answer either one of them, because I was not there that long to do it, because I was in a hurry to go home.
Q. What is your idea then as to how this was prepared?
A. Oh, I don't know how it was prepared.
Q. Didn't you see him writing the answers when you were being questioned?
A. Yes, sir, he was writing some of the answers, but I could not say which ones.
Q. Don't you remember this question and answer: "Has any

person offered to purchase this land after you acquired title; if so, who, and for what amount? A. No."

A. Well, I could not recollect it; I don't recollect it.

Q. Was that answer true when you made it?

A. Well, but I don't know if I made it or not.

Q. Did you know at that time of any person who had offered to purchase it?

A. Only so far as I was telling you that—I don't know if it was to purchase or not, but it was a verbal agreement.

Q. Do you remember this: "Did you pay out of your individual funds all the expenses in connection with making this filing and do you expect to pay for the land with your money? A. Yes, yes."

A. I believe he asked me that question, yes; yes, that is all right.

Q. Did you say yes to it?

A. Yes, I did.

414 Q. Had you told him where the money was coming from?

A. Yes, sir.

Q. What had you told him about that?

A. Well, I told him Gesner would fix it, or had it fixed, or something to that effect.

Q. Do you remember this question; "Where did you get the money with which to pay for this land, and how long have you had same in your actual possession? A. From the accumulation from farming and other work for several months."

A. Yes, I recollect that.

Q. Did you make that answer?

A. I think I did, sir.

Q. Do you remember this question and answer; "Have you kept a bank account during the past six months, and if so, where? A. Yes, sir, in the First National Bank of Prineville, Oregon."

A. Yes, sir.

Q. Was that true?

A. Yes, sir, partly.

Q. How much did you have in it?

A. At the time I don't know; sometimes I got a hundred dollars in it, sometimes $50; I believe I had $30 in it at that time, or inside of that—no, let me see; a day or two before that I drawed it out and I told Biggs about that, and Biggs said it didn't matter so long as it was inside of six months, or somewhere in the limit, that I had a bank account. Of course I go once and awhile to that bank if I need money and they let me have it anyway, even if I haven't got any there. That is the reason I recollect that question; on account of what little talk we had about it.

Q. Did you have any talk about this question, as to whether you had paid the expenses out of your own funds?

415 A. How is that?

Q. Did you and Biggs have any talk about that answer and the question? Did you pay out of your individual funds all the expenses in connection with the matter of this filing, and do you expect — for the land with your own money?"

A. Yes, we did talk about that I guess; I recollect that question anyway.
Q. Your answer to the question is, "Yes"?
A. Yes, sir, I did say "Yes."
Q. That was not true was it?
A. Well, I don't know how that is, if it is true or not.
Q. Had you paid the filing fees?
A. No, sir.
Q. Did you talk with him about that?
A. Yes, I told him Gesner had fixed it or would fix it, I think.
Q. Did you handle any money at the time of making final proof?
A. About proving up on the land?
Q. Yes.
A. No, sir, not a cent.
Q. And at the time you made the proof, did Biggs ask you for the money so as to send it to the Land Office?
A. No, he never asked me for the money.
Q. What, if anything, did you have to say about it at that time?
A. I told him that Gesner would fix it.
Q. Did you get this check back from the Land Office afterwards?
A. Yes.
Q. What did you do with it after you got it?
A. I gave it right back to Gesner.
Q. Did you sign any note or mortgage at the time you proved up?
416 A. Yes, sir; I signed two notes and one mortgage.
Q. Do you remember how much the notes were for?
A. No, I don't. I think it was around about $122 or $422, or $424; I don't recollect exactly.
Q. It was to cover the amount?
A. The whole amount of the filing and advertising and proving up.
Q. The *note* notes were both notes of the same amount?
A. Yes.
Q. One of those notes was in the mortgage wasn't it?
A. Biggs stuck one onto the mortgage, and I was talking about it, and I says, "I don't want to sign that," and he says "Well, it is customary to put one on the mortgage."
Q. And you pasted it on the mortgage?
A. Yes.
Q. So that it became a part of it.
A. Well, I don't know how.
Q. Did you get a letter at the time you got this check back, from the land office similar to this one. Look that one over.
A. I got a letter but I can't see.
Q. I will read that part of it to you: "Enclosed you will find your voucher for $410 (or whatever the amount that check was) "due you on account of deposit made for timber and stone proof suspended. The return of this money is authorized by the General land office and in no wise jeopardizes your right to the land if your

good faith and full compliance with the law are shown on examination of proof. You will be notified promptly when final decision is rendered in Washington, D. C., and can forward money to me if patent is to issue."

A. Yes, sir, yes, sir.

Q. You got a letter something like that?

A. Yes, sir, something to that effect.

417 Q. Do you remember the occasion when Mr. Neuhausen was in Prineville?

A. Yes, sir.

Q. When was it with reference to that time that you got your mortgage back?

A. Oh, it was a good while before that.

Q. Did you still have the mortgage?

A. No, I burned it up as soon as I got it.

Q. At the time that Neuhausen was up there did you have any talk with Biggs in regard to the mortgage?

A. No, not as I recollect.

Q. Did you have any talk with him at all at that time that you recollect of?

A. When Mr. Neuhausen was up there?

Q. Yes.

A. No.

Q. You don't remember?

A. No.

Q. Did you have any talk with Gesner?

A. Well, now, we talked several times together, every once in a while, but I don't know what we was talking about. I don't recollect.

Q. Did you receive a letter from Gesner?

A. Yes, I did.

Q. At the time Neuhausen was up there?

A. No, it was before that.

Q. How long before?

A. Well, I think it was a week or a week or two, or such a matter.

Q. What did you do with that letter?

A. I burned it.

418 Q. What was the substance of that letter?

A. Well he told me I better relinquish; that he did not want us people in trouble up before the grand jury, and I think he said that Moody was on the back of it.

Q. Do you remember having any talk with Biggs just before Neuhausen came up there?

A. No, I don't recollect. We may have had talk, but I don't recollect. You mean before Neuhausen came up there?

Q. Yes.

A. No, I don't recollect any before. I may have afterwards.

Q. When did you have one with him afterwards? Do you recollect any talk with him afterwards?

A. Yes, sir, I believe I did.

Q. About this case, about these matters?

A. Yes, sir, we was talking about it one day there and I was telling them Mr. Neuhausen told me if I was—I told him I was going to relinquish and he told me I need not relinquish; he says if you are all right, after I send your papers off, if you are all right, you will get it."

Q. At that time did Mr. Neuhausen take a statement from you?

A. Yes, sir.

Q. Did you have any talk with Biggs or Gesner before this statement was taken by Neuhausen, as to what you should say?

A. No, sir, Gesner pulled away from us already.

Q. What?

A. Gesner pulled away from us and told us he would not have any more to do with it when I had this letter just before he came.

Q. Just a short time before Neuhausen came?

A. Well, a week or such a matter.

Q. Did he state in the letter why he was going to quit?

A. Well, just what I told you awhile ago, Mr. Heney, that
419 we better relinquish; of course there may be trouble and he didn't want us people in trouble, called up before the grand jury.

Q. Do you remember having talked with Biggs at the home of Stephen Yancey?

A. Yes.

Q. You know where Yancey's place is?

A. Yes.

Q. Where is that from Prineville?

A. It is about 8 miles from Prineville.

Q. When was this talk?

A. Oh, that last time, now, that I believe was before the first trial, I think, if I remember right.

Q. You were under subpœna at the time, coming to the trial, weren't you?

A. Yes.

Q. Now what talk did you have with him there; what did Biggs say to you?

A. Well, he wanted to talk about it; he says "They will fix you fellows." He says, "They will fix us fellows first and then they will fix you fellows afterwards," or "cinch you fellows" or something like that.

Q. You appeared before the grand jury before that in February, 1905?

A. Yes.

Q. After you went back to Prineville did George Barnes try to talk to you about the matter in Prineville?

A. Yes, he tried to approach me on it.

Q. Did he tell you whom he was representing?

A. No, he never said nothing. Whenever anybody talked I — I mistrusted George anyway you know, and when he commenced to talk to me I told him to go on and give us a breeze.

420 Q. At the time you were here under subpœna for the first trial did Dr. Gesner have a talk with you, do you remember?
A. Yes, sir, he had one more talk. I met him on Twelfth, I think it was, on Morrison at the corner.
Q. What did he say?
A. He only asked me if I was going to come up and see him in that hotel, I forget whether the Perkins or the Imperial. I told him I guessed I would some time or other when I would get around.

Cross-examination.

By Mr. BENNETT:

Q. But you didn't go?
A. No, sir.
Q. And that is the only time you ever had a talk with him down here?
A. That is all.

Mr. HENEY: I have overlooked one matter, Judge Bennett, which perhaps I better take up now.

(Mr. HENEY:)

Q. Did you appear as a witness on the final proof of Mr. Williamson? Do you remember when he proved upon the piece of land taken by him? That is your signature isn't it?
A. Yes, that is my signature. I believe I did, sir.

(Mr. HENEY:)

Q. That was before Biggs also?
A. Yes, sir.
Q. Is that your signature on that paper?
A. Yes, that is my signature.

Mr. HENEY: I will offer these two papers in evidence.
Mr. BENNETT: This raises another question, Your Honor, upon which Judge DeHaven held with us on the other trial.
Mr. HENEY: On reflection I think I will not offer this at present, Judge Bennett, but will wait until I see it becomes important
421 in case Mr. Williamson takes the witness stand.

(Mr. BENNETT resuming the cross-examination:)

Q. You had been engaged in herding sheep over there in that country where that section 28 lay?
A. Yes.
Q. You know all about the land?
A. Yes, sir; several years ago though.
Q. But you know how the land lay and all about it?
A. Well, I don't know if I know all about it, but I know a good deal about it.
Q. You had two conversations with Dr. Gesner about filing on this land, hadn't you, one when Mr. Williamson was not present,

and one on the other side of the street when Mr. Williamson was sitting on the sidewalk?

A. Well, I believe I did, yes.

Q. Where was the first talk?

A. I don't recollect, but if we had any talk at all it must have been in Prineville, we generally had conversations there.

Q. At the second trial of this case when you were a witness you testified that there were two talks?

A. Yes.

Q. That the first talk was somewhere in town, you could not exactly place it, so long ago, didn't you?

A. Well, I guess it is.

Q. And you testified that that was where you told Dr. Gesner, or where Dr. Gesner told you he would loan you the money, was at the first talk; you testified that it was at the first talk somewhere in Prineville, you don't remember where, that he told you he would loan you the money?

A. Well, it may be, I don't know; I don't recollect. It may be though; I would not deny it and I would not acknowledge it.

422 Q. I will ask you if you testified this way at the second trial: "Q. Now you had two talks about this matter with Gesner before you filed? A. Before I filed? Q. Yes, two different talks with him before you filed? A. No, not two different talks; I had one talk before I filed and one talk when I did file. Q. Well I know, but that was a little while before you filed. That last talk, wasn't but a few minutes anyway? A. Well, right at the present. Q. Yes, that is what I mean; there were two talks, one talk quite a while before, and then that talk? A. Yes, sir. Q. Where was the first talk? A. Well now I don't know; it was somewhere in town; where, I could not exactly place it, it is so long ago. Q. Do you remember which time it was he told you he would loan you the money which time it was, the first time or the second time? A. I think that was the first time we were talking about it. Q. And the first time you talked about it was the time when you had the talk about the money, and he told you what he would do? A. Yes, sir. Q. You didn't talk about that the second time? A. No, we talked about which claim I should take. Q. He just showed you what claim, if you took any, what claim you would take? A. Yes. Q. Now, at the first talk you had, just you and he were present alone? A. That is all. Q. At the time when Mr. Williamson was sitting by he just called you over and told you if you wanted to take a claim, this was a good claim, the one he marked out on the plat? A. He didn't say a good claim. He told me I could take the northeast quarter of section 28. I knew about the country there anyway. Q. You knew all about it yourself? A. Yes, sir, I knew every foot of it. Q. There was not much conversation then there at that time? A. No, only that what I tell you. Q. He just pointed out the land? A. Pointed out the land to take, that quarter section. Q. The main talk you had about the matter was before? A. Yes. Q. About

423 how long before? A. Well I could not tell. It might be a week and maybe two weeks; so long ago I didn't keep no track of the dates."

Did you so testify?
A. I believe I did.
Q. That is right, is it?
A. Well, I guess that is all right, yes.
Q. The talk that you had about loaning the money and all that was when you and Gesner were alone; and then he called you over there afterwards and asked you if you wanted to take a claim when Mr. Williamson was sitting by?
A. Yes, but listen. The way you read it there, it looks like I talked three times to him.
Q. No, I don't mean that. Two times only.
A. No, but the way you read that question there, it is three times.
Mr. HENEY: No, I think not Henry, you misunderstood him.
A. Didn't he read there I talked it twice with him, close on the same day; it sounds to me; the same day, and at the other times he reads, a couple of weeks back I talked to him.
Mr. HENEY: No, two talks; one talk some days before, and the other talk just a few minutes before you went to file.
A. Well, that may be.
Q. At the first talk, Mr. Williamson wasn't present?
A. No.
Q. At the last talk he was?
A. Yes; well he was close by.
Q. Close by on the sidewalk there?
A. About the length of this table.
Q. Now then, in relation to this final proof, you claim that as this was made out, these questions were all asked you, and then Mr. Biggs would write down the answers; you would talk the matter over, and then Mr. Biggs would write down the answer.
Q. How do you mean, talk the matter over?
424 Q. Well, about these different questions. Counsel has asked you if you had a talk with Biggs about these different things in which he explained about some of them.
A. Yes.
Q. You claim that he would ask you the question and then you would talk about it, and he would explain and then you would answer and he would write down the answer?
A. Well, I don't say all of them.
Q. Well, such as you did.
A. But the ones he did, we talked the matter over.
Q. It was done right there at that time they were being written out?
A. Yes. Well, I don't say that. There is so many questions in there; there is 38 questions in there—in them papers.
Q. Well, I know, but these questions that he did explain, to you different ones he did explain, were explained right there while he was writing it out?
A. Yes.
Q. While it was being written out?
A. Yes, that is all right.
Q. Well, now, Mr. Hudson, as a matter of fact, don't you know

it to be true that Mr. Biggs never wrote these questions at all, but that Mr. Boggs wrote them?

A. Well, I have seen them papers; them papers were showed to me and asked me.

Q. Well, it was Mr. Boggs?

A. Yes, but I never was before Mr. Boggs.

Q. Wasn't it Mr. Boggs that you talked this over with?

A. No sir.

Q. As you wrote these questions and answers down?

A. No sir. I could take a solemn oath to it, I never talked with that man.

Q. Well, Mr. Biggs never wrote down your questions and
425 answers at all, did he?

A. Well, he wrote some of them down while I was there. I made my filing and my proof before Biggs. I never had nothing to do with Boggs.

Q. What ones of these was it that Mr. Biggs wrote down?

A. I don't know. I can tell you one thing; I never was before Boggs. I seen some papers where Boggs' handwrite is. I was showed it. Of course I can't tell. I see some of them; well I can't tell the handwriting, who it was by, but I know one thing—I never was before Boggs.

Q. Now, isn't it a fact that it was Boggs that wrote these questions and answers down, and Boggs, that you talked to, and that after they were written out, why then you took the paper to Biggs and swore to it before him?

A. No, I never took the papers from Boggs to Biggs in there. I stayed right in the office. Now let me tell you, Mr. Bennett, if I recollect right, Boggs he was working with Biggs, and he was sitting, the time that I come there, in the front office, and Biggs was in the back office, and I went to Biggs in his back office; Boggs was busy; so, if I recollect right now, it was some other man on some other business. I never went before Boggs. I never had anything to do with him.

Q. Isn't it a fact that you filed these out in the front room before Boggs?

A. No, sir.

Q. And then you took them back before Biggs and swore to them?

A. No, sir; I never did.

Q. Isn't it a fact that Biggs was busy with something else just at that time?

A. I never was before Boggs and I stay with it.

Q. You told Biggs whom you wanted to have for witnesses
426 to prove up, didn't you?

A. Yes, sir; I did.

Q. Now, you were figuring that you could get 800 or $1000 out of this claim, weren't you, Mr. Hudson?

A. I did; yes sir.

Q. And you were intending to sell it to whomever would give the most money?

A. I did.

Q. And then if you couldn't get more than $500 for it you would drop back on Gesner's offer and take that?

A. Yes; I would, provided I couldn't get more.

Q. Do you understand just what verbal agreement means?

A. No; I am not much of a lawyer or understand law much; but to my notion a verbal agreement don't amount to much.

Q. So when you say that you think there was some kind of a verbal agreement between you and Dr. Gesner, you mean that there was something that didn't amount to much?

A. I did. But I want you to ask me that question once more. (Question read.)

A. Well, I just was studying about that. What I mean, didn't amount to much in law, if it comes to law.

Q. Now, you were talking up there about that time about holding that land for a pasture for yourself, weren't you?

A. Well, I guess that maybe I did. I don't know.

Q. Well, don't you know you did? Don't you know you were doing that so as to make people who wanted to buy the land bid up lively and give a good price for it?

A. Well, I believe I did say so.

Q. What say?

A. I believe I did, but am not positive. Well, I mean to tell the truth to you, but then sometimes I forget a little.

427 Q. I understand, of course. You can't be blamed for that. It is 3 years ago. Now, let me refresh your memory. Maybe you will remember about it better then. At the first trial you testified about that, didn't you, when I asked you about weren't you keeping it for a pasture, that that was only a kind of get off to make them believe that you could use it for a pasture yourself and then, in answer to the question, "So as to get a big price for it?" you said, "Well, of course."

"Q. And so as to hold up the price? A. Well, of course. Q. You were figuring some and talking some about holding it for a pasture yourself? A. Well, I did; yes, partly. Q. That was the idea of making them bid up lively for it when you got it? A. Well, of course I believe everybody for himself and God for us all."

Did you testify that way in substance at the first trial?

A. That is what is marked down on your folks' side. Now, Mr. Heney, can I ask that question of you?

Q. You want to ask Mr. Heney, eh?

A. Well, I'm not going to trust one side all the time.

Q. Mr. Heney will have a chance at you after a while.

Mr. HENEY: He means, was that in there. Yes; it was in your testimony.

A. Yes; I guess I did then. Well, it is like that: I don't trust either one of them for that matter.

Mr. HENEY: You have noticed that we don't trust each other, haven't you?

A. Well, I don't know about that.

Q. Now about — this came up before the Grand Jury you
428 were very much frightened, weren't you, for fear the government would get after you?

A. No, I wasn't much frightened. Of course it worried me a little, but then I was- frightened much.

Q. You wasn't frightened?

A. No.

Q. Well, didn't you think that Mr. Heney was going to indict you?

A. No, sir; I never thought so.

Q. Do you say that you wern't afraid he was going to indict you?

A. No.

Q. Do you remember, after you were down here before the grand jury and after you went back, do you remember of going up to Mr. Vanderpool's, Mr. Ned Vanderpool's?

A. Yes, sir. That was, I believe, a night or two after I got back.

Q. Yes.

A. Yes.

Q. And did you have a talk about this matter there in the presence of Mr. and Mrs. Vanderpool, Mr. Kaylor and Miss Pearl Vanderpool being in the next room?

A. Yes, they were in the next room sparking one another. They wasn't in the same room where the old folks was.

Q. What say?

A. I say they wasn't in the same room where Mr. and Mrs. Vanderpool was.

Q. But you were in the same room where the old folks were, weren't you?

A. I was.

Q. Did you say there in the presence of him and Mrs. Vanderpool?

A. Who do you mean—the old folks?

Q. Yes, the old folks. The other was Mr. Kaylor and Miss Vanderpool?

A. Yes.

429 Q. Did you say there in the presence of Mr. and Mrs. Vanderpool that you were afraid that Mr. Heney would indict you?

A. No sir.

Q. Or words to that effect?

A. No. Not that I recollect. In the sitting-room with the old folks I never mentioned him.

Q. Did you say anything about being indicted in the presence of Mr. and Mrs. Vanderpool?

A. No, sir.

Q. Did you say that you were afraid that you would be indicted?

A. No, sir.

Q. You didn't say anything of that kind?

A. No, sir.

Q. Well did you say that you were afraid of being indicted or that you were afraid that Mr. Heney would indict you, in the room where the young folks were?

A. No, sir.

Q. On that same day?

A. It was in the evening about 9 o'clock.

Q. Well, that same evening?

A. Yes. I was in the room and I never said that.

Q. You never said anything of that kind?

A. Not that way; no.

Q. Did you immediately after go back down to town—did you go back to town and go to the post office?

A. Went to the postoffice?

Q. Yes, there that day or the next day?

A. Oh, I don't know. I don't recollect.

Q. Well, did you, on that day or the next day at the post office in Prineville, Oregon, in the presence of Mrs. Summers—you know Mrs. Summers, don't you—her husband keeps the postoffice there?

430 A. Yes, sir.

Q. In the presence of Mrs. Summers and Maude Vanderpool?

A. Yes.

Q. Did you say you were afraid Mr. Heney would indict you?

A. No; not that I recollect of.

Q. Or that you were afraid of being indicted?

A. No; not that I recollect of.

Q. Or that you thought that you would be indicted?

A. No, sir.

Q. Or that you were scared to death?

A. No, sir.

Q. Did you say that you were scared to death about being indicted, when you were up at the Vanderpools' at the time I have indicated?

A. No, sir; I never did.

Q. Now, at the time you were coming down here as a witness before the Grand Jury, Mr. Biggs was summoned before the Grand jury at that time, too, wasn't he?

A. Yes, sir.

Q. And on the way down on the train, didn't you tell Mr. Watkins and Mr. Biggs—first I will ask you before that, didn't you get so much frightened out there that you went and made your will before you came down?

A. Yes, I did; but I tore it up. I saw it bothered your mind so much and I tore it up.

Q. You got over your scare?

A. Oh, I got over that long ago.

Q. When was it you got over your scare and tore up the will?

A. Just a little while before I came down.

Q. Before you came down this time?

A. Yes, sir.

Q. Oh, before you came down this time?

431 A. Yes.

Q. And on the way down, now, at the time that I have indicated in the presence of Mr. Watkins and Mr. Biggs, didn't you tell them that you didn't think you would ever get back?

A. Well, I might have told them so; yes.

Q. And didn't you tell them that if you had all your property in money that you would get out of that and nobody would ever see you in the country again?

A. Well, let me tell you now——

Q. All right.

A. We was all pretty well loaded in them days, and a fellow will say a good thing and talk a good many jokes and joshing, you know, when he is pretty well gone,—shot.

Q. You were kind of joshing?

A. Well, we was all half tipsy. We had a good deal of whiskey aboard.

Q. Were you joshing?

A. Yes; I was joshing anyway.

Q. Do you and Biggs josh a good deal?

A. He never was around us much in the cars. He had one car amongst the ladies and we were sitting in the smoking business, smoking and drinking.

Q. I say, do you josh a good deal together when you are at home?

A. Once in a while; yes.

Q. Are both of you something of joshers?

A. Oh, I don't know that he is; but if he can give me a josh I can give one back, and I can take one.

Q. Were you and he joshing when you were talking about "they would do them fellows first and then they would get after you fellows?"

A. Oh, we wasn't joshing that time.

Q. You weren't joshing that time?

432 A. No; not that time.

Q. Oh, you were in earnest?

A. Yes, sir. I don't know whether he was in earnest. I was in earnest. I took it that way all right enough.

Q. You don't know whether he was in earnest or joshing?

A. I don't know about that. I was in earnest. I took it that way.

Q. Now what Gesner told you was that if you wanted to take up a timber claim, it was worth $500 to him?

A. Yes, sir.

Q. And from that you inferred that there was some sort of a verbal agreement?

A. Why yes; there was some kind of an agreement.

Q. Now about these notes, you say you signed two notes?

A. I did, sir.

Q. For the same amount you mean?

A. For the same amount; yes.

Q. You don't mean two separate notes, but one to go in the mortgage and one for the note?

A. Yes, sir.
Q. That is, two copies of the same note?
A. Yes, same note; the same amount of money.
Q. You didn't sign a separate note for the amount of the filing fees and another for the amount of the purchase price?
A. No, no.
Q. It was all in one note?
A. All in one note.
Q. Now, isn't this what Dr. Gesner said,—"that claim is worth $500 to me if I get a deed for it?"
A. Yes, that is what he said. I have been telling that here, and I told you that two courts before this, two trials, if he get a deed for it, if I recollect right.
Q. I believe you said you intended to sell the land to the highest bidder?
433 A. Well, yes, I was going to. I had it in my mind. I didn't tell him so.
Q. But that is what you intended to do at the time you were talking with him?
A. It was; yes sir.
Q. And you were very careful not to say anything that would prevent you from doing that?
A. No, of course not. I didn't tell it to anybody until I got here.
Q. You were very careful not to say anything to anybody that would prevent you from selling it to anybody else if they would offer you any more money? I say, you were very careful not to say anything to Gesner that would prevent you from having the right to sell it to somebody else if you could get more money?
A. No; I never told him anything,—never said nothing to him.

Redirect:

Q. Why didn't you tell Gesner that you had an idea of selling it to somebody else?
A. Well, I didn't know—Mr.

Mr. BENNETT: We object to that on the same ground as to all this matter that we did to like testimony on the part of the other witnesses.
COURT: You may answer the question.

A. Well, I didn't know but if I told him he might go back on the bargain.
Q. Now did he say to you that it was worth $500 to him, when he got a deed, or that he would give you $500 for it when you got a deed?
A. He told me he was going to give me $500 for it. No, that is not the way he said it. I believe he said it was worth $500
434 to him, and intended to give it, if I would make him a deed—give him a deed to it. That is about the way he said it.
Q. Would you have taken up this particular claim if he hadn't said he would give you $500 for it?
A. No.

Objected to as immaterial and incompetent.
Objection overruled. Defendants except.

A. No; I don't think I would.

Q. On the first trial in connection with the matter that you have been asked about by Mr. Bennett as to how you testified, weren't these questions asked you and didn't you make these answers:

Question: "And then were you intending to throw him down (meaning Gesner) after you got it and not deed it to him? Answer: Well, now, I tell you, Mr. Heney, he threw me down sometimes, and I thought I was going to make out of it all I could, you know. Of course the intention was all right enough in the first place and that it had to go to him you know; but the way that I had my mind fixed up, I thought 'I am going to raise the price on him,' and if he wouldn't give it, I would sell it to somebody else, and if he wouldn't give more for it, I would let it go if I could get more. That was in my mind. I don't know if it looks honest or not, but I had it in my mind."

Do you remember that question and answer?

A. Yes sir.

Q. And you so testified?

A. Yes; I testified.

Q. Now, do you remember these, then Mr. Bennett commenced to question—

Question: "You intended to sell it to whoever would give you the most money?" Answer: Yes, I was going to. Question: If Gesner would give you just as much as anybody else you would sell it to him? Answer: I would if he would give me about $1000,—I had my price set in my mind. Question: If he would give you your price for it and as much as anybody else you would give him the preference? Answer: Well, yes, I would, I guess. Question: But if somebody else would give you more you would sell it to them? Answer: Of course I would. Question: And if there wouldn't anybody give you your price, you would keep it till somebody did? Answer: No, I was going to fall back on him then. I had a dead cinch on it anyway."

435 A. That is right.

Q. "Question: He had agreed to buy but you hadn't agreed to sell?" Answer: "Well, I leave that to the Judge and Jury to decide." Question: "Well that is the way you understood it; he had agreed to buy, but you had not agreed to sell?" Answer: Well, it was like this, you know, you must understand it right, Mr. Bennett. The aim was, he was going to get that land for $500, but then I didn't care a snap; he was going to make a big thing, and I thought I was going to make a big thing if I could." Question: "And you were buying it with the idea of selling it where you could make the most money. You also had some idea of keeping it for a pasture?" Answer: "That was only a kind of get off to make them believe that I could use it for a pasture myself, you know."

Is that correct? Did you give that testimony?

A. Yes; I believe I did.

Q. Is that true?
A. Yes, sir.
Q. Did you say anything about using it for a pasture at any time before you got that money back from the land office?
A. I believe I did. I think it was before that.
Q. Well, did you say anything about it before you made final proof, before Gesner put up the money?
A. No; I never did.
Q. Now, didn't you also in that first examination, testify on that first trial this way: "Q. How did you come to file on it? Did anybody speak to you about it?" "A. Yes, sir." "Q. Who?" "A. Doc Gesner." "Q. What did he say to you?" "A. Well, he asked me if I wanted to file on a timber claim, and I told him, 'Yes.'" "Q. Yes, if what?" "A. How do you mean?" "Q. Is that all you said, 'Yes?' Well go on and tell the whole conversation." A.
436 "Well, I told him like this: I says I will file on a claim if I can make some money out of it, so I filed on a claim." "Q. What did he say to that." "A. He says he would give me $500 for the claim when I gave him a deed for it."
Do you remember that testimony?
A. Yes, sir.

Mr. BENNETT: We object to that, your Honor, as not proper redirect, and incompetent.
Mr. HENEY: It is a part of the examination on the first trial that bears directly upon the examination on the first trial that counsel for the defendants read to him.
Objection overruled.
Mr. BENNETT: We take an exception. And as the witness answered before I had a chance to object, Your Honor, I desire to move to strike out the answer upon the same ground.
The COURT: The motion will be denied.
Defendants except.

Q. What were Williamson and Gesner doing at the time Gesner called you across the street, just before you filed?
A. Well, they were sitting on the sidewalk there.
Q. Was anybody else with them?
A. No; not what I can recall of.
Q. Where was that with reference to their office?
A. How far it was from the office?
Q. Yes.
A. Well, the office is on one street alongside of the postoffice, and this was before the Poindexter Hotel,—in front of the Poindexter Hotel.
Q. Who was this man, Boggs, who was in Biggs' office?
A. Boggs? Well, I don't know. I think he was some kind of a clerk or something. I don't know what he was.
Q. Did you see him around Biggs' office before that? Had
437 you ever seen him there before the day that you went in to make final proof?

A. Well, he might have been there, but I never paid any attention to that. Still I seen him lots of times in Prineville before that.

Q. Did you know where his office was before that?

A. Boggs' office?

Q. Yes; Boggs' office.

A. Yes, I believe I did. I think he had it stuck up on the sign,—Boggs and Biggs, or something. I believe, Boggs' name was on there if I recollect right.

Q. Had you any other business with Boggs at any time?

A. No sir; I never had.

Q. Now why don't you think a verbal contract amounts to much? What did you mean by saying it didn't amount to much?

A. Well, I don't know. Well, I thought he couldn't do nothing. I had a drop on the business anyway.

Q. You mean it is pretty hard to enforce it. Is that it?

Objected to as leading.

A. Well, I don't know.

Q. What caused you to make your will before you came down here?

A. Well, I didn't know what may happen when I come here.

Q. Was it on account of fear of anything that would happen to you as a witness?

A. No, no; oh, I didn't know—there might get a train wreck or something else might happen. I don't know what may happen.

Q. You didn't think there was any danger of the death penalty for you in connection with this case, did you?

A. No, oh, no, no, no.

Recross.

Q. If they put you in jail you couldn't get back, could you?

A. Put me in jail?

Q. Yes. I say, if they put you in jail you couldn't get back
438 until you got out of jail anyway.

A. Well of course if I am in jail I couldn't get back. It would hold me there I guess.

Q. Counsel has asked you what you thought about this verbal agreement and about it being hard to enforce. You thought you had a cinch on Gesner all right, didn't you?

A. I did; yes.

Q. You thought you could hold him but he couldn't hold you, didn't you? That is about the size of it, isn't it? You thought you could hold him because he had made an offer, but he couldn't hold you because you hadn't said a word? That is about the size of it?

A. Yes; that is the way I had it fixed up.

Q. You don't mean to say there was any sign of Boggs and Biggs on that building?

A. Well now, I thought—I'm not sure—but I thought I saw Boggs' name on that building too.

Q. Isn't this the way of it: that Boggs had a sign on the building and Biggs had a sign, but they weren't together?

A. You say Boggs had a sign?
Q. Yes; Boggs had a sign, one sign, with his name on it?
A. Yes, I believe——
Q. And Biggs had another sign with his name on it?
A. Yes, I believe it is. I think if I recollect right the two signs was above one another.
Q. Yes; they had offices there together, or Boggs had office room in Biggs' office.
A. Well, I don't know about it. That may be. I don't know.
Q. Boggs was a lawyer himself, practising law?
A. I don't know what he is. He never practised no law there.
Q. Now you say you wouldn't have bought that land if you hadn't had the offer from Dr. Gesner. You wouldn't have
439 bought any timber land unless you had some idea where you could sell it, would you?
A. I guess not; no.
Q. What say?
A. I think not.
Q. I say, you wouldn't?
A. No; I don't think I would.

Redirect examination:

Q. When the doctor asked you you say he asked you if you didn't want to file?
A. Yes. He asked me something like that—if I wanted a claim—wanted to file on a claim.
Q. And you told him you would, if you could make some money out of it?
A. I did.
Q. And then he said what?
A. He told me he would give me $500.
Q. Then what did you say in reply to that?
A. Well, I don't know how you mean.
Q. Well, when he called you over there didn't you say that you would do it?

Objected to as leading. Let him ask whether there was anything said or not.

Q. When he said he would give you the $500 what did you say in reply?
A. Well, I told him I was going to do it; yes.
Q. Didn't you think that constituted an agreement with him then?

Objected to as leading and as asking for the opinion of the witness.

Objection overruled. Defendants except.

Q. Answer the question. Didn't you think that constituted an agreement with him?
A. Why, yes, sir; I thought it was an agreement, yes.

Witness excused.

440 CHRISTIAN FEUERHELM being called as a witness for the Government and having testified, and having made an application, etc., was asked among other things the following question: Q. "Now at the time you filed this paper—signed it—what was your intention as to what you were going to do with the land when you got title to it?" To which the defendants objected as incompetent and immaterial and not in any way binding upon the defendants, but the objection was overruled to which ruling the defendants excepted, and the witness answered "Well I thought it should go to Gesner" and thereupon the Final Proof papers of said witness were offered and admitted in evidence over the objection of the defendants as in similar cases hereinbefore referred to. Said witness was also asked by the Government the following question, "What was your understanding when you left Gesner and when you filed on a claim as to whether you had promised that you would let him have it when you got the title?" A. Well there was no real promising. Q. You didn't say that? A. No, sir. Q. But what was your understanding as to what he believed, and what do you believe? To which the defendants objected as incompetent and immaterial, calling for a conclusion of the witness and not binding upon the defendants but the objection was overruled,and the defendants excepted and their exception was allowed, and the witness answered: "I believed nothing else, but I went in to file on the claim." Thereafter the witness was asked the question, "At the time you filed did you intend to let Dr. Gesner have the land when you got the title—at the time you were signing that paper—filing?" To which the defendants objected as incompetent and immaterial, calling for a conclusion of the witness and not binding upon the defendants but the objection was overruled and the defendants excepted where-
441 upon the witness answered, I guess I thought so.

The following is all of the testimony of the aforesaid witness Christian Feuerhelm, introduced at the trial.

442 SEPTEMBER 13, 1905.

CHRISTIAN FEUERHELM, witness called on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. HENEY:

—. Mr. Feuerhelm, where do you live?
A. Four miles east of Prineville.
Q. How long have you lived in that vicinity—up in that county.
A. It will be five years——
Q. How long have you lived in the County of Crook?
A. It must be sixteen years—something.

Mr. BENNETT: Speak a little louder.

A. Sixteen or eighteen years.
Q. How long have you known Mr. Williamson about?
A. About 4 or 5 years, or 6. I don't know exactly. I think it is about 5 years, something like that.

Q. Were you on friendly terms or otherwise with him?
A. Oh, friendly terms as much as I know.
Q. How long have you known Dr. Gesner?
A. Four years.
Q. Were you on friendly terms or otherwise with him?
A. Just the same.
Q. Have you only known him 4 years?
A. Well, it is between 4 and 5 years.
Q. What were you doing up there in 1902? What business were you in?
A. I got a homestead there.
443 Q. Married, are you?
A. Yes, sir.
Q. And living on it?
A. Yes, sir.
Q. Did you file on a timber claim in 1902?
—. Yes, sir.
Q. Who, if anybody, spoke to you about filing before you filed?
A. Well, nobody asked me to. I heard that they took up timber lands and I walked along the street there and saw Dr. Gesner. I walked up to him and asked him.
Q. What was the conversation with him?
A. Oh, I asked him if he would buy it when I proved up on it.
Q. What did he say?
A. He says—I understand, if I recollect right—I think it was he would.
Q. And was anything said about how much he would give you for it?
A. Yes, sir.
Q. How much?
A. $500.
Q. And what did you say when he told you he would do that? What did you say about whether you would file or not?
A. I don't think I said anything to him?
Q. When did you file after that?
A. I think I went right into Biggs' office and filed, and I think it was the very same day.
Q. How did you get your numbers?
A. Mr. Biggs gave them to me.
Q. What did you tell Biggs when you got in there?
A. Well, I told him that Dr. Gesner told me to go in and Biggs would fix the business.
444 Q. Now, in this talk with the doctor what was said about where the money was to come from for final proof? Did he say anything about that?
A. Well, we was talking. I can't recollect exactly the words, but I told him that I had money and I could get it in time to prove up and he says, "Oh, that's all right," he says; so I walked into Biggs' office and I gives Biggs a note to fix that for the money.
Q. When you got in Biggs' office, when you went to make that

filing, what was it you said to Biggs, when you went there and signed these papers, the first ones?

A. I guess there wasn't very much said.

Q. That is your signature on those papers, is it?

A. Yes, sir.

Q. Now, at the time you signed it did he swear you to it?

A. I don't know.

Q. You don't remember?

A. No.

Q. How did you get those numbers,—the description? Who gave you those?

A. Mr. Biggs did.

Q. And how did he know what numbers you wanted?

A. Well, I didn't care exactly what numbers exactly,—the ground.

Q. You didn't care what piece you filed on, is that it?

A. No.

Objected to as leading and argumentative.

Q. What did you tell Biggs when you went in there. Tell us all that you said to him when you went in.

A. Why, I think I didn't say very much anyhow.

Q. I know; but you must have said something when you went in?

445 A. Well, I told him that I was going to file on a piece of timber land and I told him that I know the whole country; every foot of it, it wouldn't make very much difference to me just exactly which part.

Q. Why didn't it make any difference?

A. Well, I mean exactly the one quarter.

Q. Well, why not? Why didn't it make any difference to you?

A. Well, I guess one is pretty near all the same value in that part.

Q. Well, are they all the same value?

A. Well, pretty near, I guess.

Q. You better guess again. What do you think about it?

Objected to.

Q. Are they all about the same value?

A. Well, I think there ain't very much difference in it.

Q. Aren't there lots of those quarter sections that have no timber on them at all?

A. Oh, probably, away on some of the south slopes, where they ain't so much on it.

Q. Aren't there some that haven't any on it?

A. I hardly think there is 160 acres right around close to it where there isn't any timber.

Q. But aren't there lots of them where 120 out of 160 wouldn't have any timber on?

A. Well, I couldn't say exactly. I didn't measure it.

Q. You wouldn't have to do any measuring would you, if you walked over the ground?

A. I herded over it for years.

Q. Aren't there lots of open spaces there?

446 A. Yes; there is some.

Q. There are some?

A. Yes.

Q. Well, now wouldn't it make a differencce if your filing happened to be on an open space where you did not get any timber?

Mr. BENNETT: It seems to me, your Honor, this is a cross-examination, not direct.

A. I didn't think about that.

The COURT: I see no objection to his leading him, Judge.

Mr. BENNETT: It seems to me he has no right to go so far as to stand up here and argue with the witness about the questions in relation to the matter—his own witness.

Mr. HENEY: "His own witness?" What makes a witness a man's own witness is the fact that he is believed to be called because he is friendly to that side. Now if there is a single witness that is called on here that shows he is friendly to our side and desires to tell everything he knows to our benefit, I will have to get a magnifying glass to look at him.

Mr. BENNETT: If there has been a single witness that has been friendly to our side, I think it would take a thousand magnifying glasses to find him. This witness hasn't shown himself to be friendly to one side or the other.

Objection overruled.

Defendants except.

Q. Did you say anything when you went in as to who sent you there?

A. No.

Q. You just let him imagine?

A. Who?

Q. When you got into Biggs' office?

447 A. Yes, I told Mr. Biggs that Mr. Gesner had sent me.

Q. Well then, when you told him that did he produce the numbers?

A. Yes, sir.

Q. Did Biggs then produce the numbers himself?

A. Yes, sir.

Q. And he fixed up your papers for you?

A. Yes, sir.

Q. Now, at the time you signed them did he call your attention to this clause in them: "That I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit; and that I have not directly or indirectly made any agreement or contract with any person or persons whomsoever by which the title I may acquire from the

Government of the United States may inure in whole or in part to the benefit of any person except myself."

Did he read that to you?

A. I don't know.

Q. Well, do you remember having any talk about it? Did he say anything to you about it?

A. I can't remember.

Q. Well, now, then, did you tell him at that time anything about who was to furnish the money for you to prove up?

A. I guess Mr. Biggs knowed it. I can't remember if we had any conversation about the money.

Q. Did he say anything to you about paying the filing fees?

A. That he was going to pay the filing fees?

Q. No. Did you pay the filing fees when you went?

A. Yes, sir; I paid my own money.

Q. You paid it with your own money?

448 A. Yes, sir.

Q. Did you say anything to him about who you wanted for witnesses?

A. I can't remember.

Q. Did you see the notice of final proof published in the newspaper? Did you see it?

A. Yes sir.

Q. And you knew when the time was that you were to go and make your proof, did you?

A. Yes, sir.

Q. Did you go and make proof before Biggs?

A. Yes, sir.

Q. Now, at the time that you filed this paper—signed it—what was your intention as to what you were going to do with the land when you got title to it?

A. Well, I thought it should go to Gesner?

Q. Now, at the time that you made final proof, what was your intention as to what you would do with the land when you got title? Did you have the same intention then?

A. Then I thought you knew—of course, I gave a note for the money. The money was my own, and I really didn't know what I would do.

Q. Had you any further talk with him? Did you have any further talk with him about it before you made the final proof?

A. Not as much as I know.

Q. You don't remember of having any?

A. No.

Q. Now, when you went to make final proof, did Biggs ask you where the money was? Did you furnish the money there at that time?

A. No, sir.

449 Q. Did you handle the money at all?

A. No, sir.

Q. Well now, then, you had not changed your intention any, then, at the time you signed this, had you?

Objected to.

Q. You hadn't given any note yet, had you, when you signed that?

Objected to as leading and argumentative and putting the words in the witness' mouth.

Objection overruled.

Q. Had you given any note?

A. I signed the note before I proved up.

Q. You did sign the note before you proved up.

A. Or else on the same day.

Q. Or else on the same day. Who did you sign the note before? Before Biggs or before Gesner?

A. No, before Biggs as much as I can recollect.

Q. Your recollection is that Biggs had the note there when you signed your final proof and had you sign it then?

A. Yes, sir.

Q. And did you sign a mortgage also?

A. I can't remember.

Q. Do you remember who your witnesses were?

A. I do not remember; no.

Q. Do you know Charles A. Graves, the surveyor?

A. Yes, sir.

Q. Was he one of your witnesses on final proof?

A. I couldn't say.

Q. Don't you remember seeing him there?

A. Yes, sir.

Q. At the time you made final proof?

A. I seen him in there, but I wasn't acquainted with him at all.

Q. Oh, you weren't acquainted with him?

A. No.

450 Q. You never asked him to be a witness for you?

A. Well, I don't know if I did.

Q. Did you know Henry Hudson at that time?

A. Yes, sir.

Q. Was he there as a witness for you?

A. Yes, sir; I think so.

Q. Is that your signature upon that paper?

A. Yes; that's my signature.

Q. Is this your signature?

A. Yes, sir.

Q. You signed those two papers when you made final proof, didn't you?

A. Yes, sir.

Q. Now at that time were you sworn to them by Biggs?

A. Well, I don't know whether I was or not.

Q. At that time did you know how much timber there was on this claim that you were proving up on?

Mr. BENNETT: We make the same objection to that as to all this investigation into the matter of the timber, Your Honor.

Objection overruled. Defendants except.

A. I don't know. I can't remember.

Q. You didn't understand my question exactly. I said, did you know how much there was on it at the time you were making a final proof?

A. Just about; yes.

Q. You thought you did know?

A. Yes. A fellow told me. He gave me the numbers and I found out you know, just about the spot. He told me there would be about 500 — feet or something, on it.

Q. Who was it told you that?

451 A. That was a man from Mitchell. I don't know his name.

Q. He told you that he thought there was about 500 thousand feet on it?

A. Yes. I think that was the number.

Q. Now, at the time you were making final proof, did you tell Biggs that you thought there was about one and one-half million feet on it?

A. I can't remember.

Q. You can't remember?

A. No.

Q. At the time you were making final proof do you remember this question and this answer: "Do you know of any capitalist or company which is offering to purchase timber land in the vicinity of this entry? If so, who are they, and how did you know of them? Answer: No."

Mr. BENNETT: We object to that, your Honor, upon the ground that it is not any matter alleged in the indictment and is incompetent and immaterial.

Objection overruled.

Defendants except.

Q. Do you remember that question and answer?

A. I couldn't say. I couldn't answer. Don't know what it means.

Q. You didn't know what it meant?

A. No, sir.

Q. Did you tell Biggs whether you knew what it meant or not?

A. No; I never said anything.

Q. Did you make no answer to it? Didn't you make this answer: "No," that is written here?

A. No; I think I didn't make no answer, not that I remember.

Q. Do you remember who it was that was questioning you;

452 whether it was Biggs or Boggs? Did you know Boggs?

A. If I have to tell the truth, I didn't know anything about answering any question.

Q. Why?

A. Well, of course, I think there wasn't any question put to me.
Q. You think there wasn't any question put to you?
A. No.
Q. Do you think this was already written?
A. Well, it must be.
Q. When you weren't there?
A. I don't know, but I know I didn't answer any such question.
Q. Did you see anybody writing the answers when you were there? Were questions read to you and answers written down?
A. No.
Q. Do you remember this question being asked: "Has any person offered to purchase this land after you acquire title; if so, who, and for what amount? Answer: No."
You would understand that question, wouldn't you?
A. I understand what you are reading now, but that hasn't been read to me, not to my knowledge.
Q. You don't think you made that answer?
A. No. I didn't make no answer at all on that. Of course, I don't believe it has been put to me.
Q. Do you remember this question and answer: "Where did you get the money to pay for this land and how long have you had same in your actual possession? Answer: Worked for. Had it for three or four years."
A. Yes, sir; and I had money long before that.
Q. Did you make it?
A. Yes; I drew from the Hickory Company once $1100
453 for working in one check.
Q. Yes; but did you have this money on hand at the time you were making final proof?
A. Oh, I always had money on hand.
Q. Did you have $400 on hand at the time you were making final proof?
A. Oh, I didn't have it all, but I had some, and I could have had the other part at the same time that I had to pay it.
Q. Yes, you could have had it, of course?
A. Yes.
Q. Did you have it?
A. Yes, I could have it in that time.
Q. Yes, you could have, but you didn't have it right there? You didn't have it on hand—$400?
A. I had a check there—a note. I could have changed the note just about that quick for money.
Q. You could have gone and got the money on the note?
A. Yes.
Q. But, did you have the money? Did you have any money in the bank?
A. No; I didn't have it in the bank.
Q. Did you have any at home?
A. Yes, sir.
Q. How much?

A. I had over $200 at home and I had $400 standing by my brother-in-law.

Q. Owing you?

A. Yes, sir.

Q. Now, the $200 you had at home, was all the money you had on hand at that time, was that right?

Ans. That's right.

Q. You say you didn't have any money in the bank?

A. No, I think I had it drawed to let my brother-in-law
454 have it a little while before. I couldn't say exactly how long before.

Q. When you had the money in the bank, what bank did you keep it in?

A. First National Bank.

Q. Now, did you tell Biggs that you had worked for the money you were going to use?

A. No, I guess not.

Q. You were signing a note and mortgage for it at the time that you were signing these, were you?

A. Yes, sir.

Q. At the time you signed the final proof?

A. Yes, I guess I did.

Mr. HENEY: We will offer this final proof paper in evidence, and the cross examination paper. Marked "Plaintiff's Exhibit 54."

Mr. HENEY: We will also offer the original sworn statement. Marked "Plaintiff's Exhibit 55."

Q. Did you get the money back from the Land Office?

A. Yes, sir.

Q. Is that the check?

A. Yes, sir.

Q. What did you do with it after you got it?

A. With the money?

Q. Yes, with this check—did you go and cash it yourself?

A. Yes, sir.

Q. What did you do with the money?

A. Took it to Mr. Biggs.

Q. Right away?

A. Yes, sir.

Q. And did you get your note and mortgage back then?
455 A. I got the note back?

Q. Didn't you get the mortgage back?

A. I don't know if there ever was any mortgage. I couldn't say. I couldn't remember exactly. I don't know what the mortgage was.

Mr. HENEY: We will offer that check in evidence.

Marked "Plaintiff's Exhibit 56."

Q. At the time you got that check, you received from the Land Office a letter, did you not—about the same as that one. This letter says:

"Enclosed you will find voucher for $440" (yours would be

$411.25) due you on account of deposit made for timber and stone proof suspended.

The return of this money is authorized by the General Land Office, and in no wise jeopardizes your right to the land if your good faith and full compliance with the law are shown on examination of proof. You will be notified promptly when final decision is rendered in Washington D. C., and can forward the money to me if patent is to issue. Please sign voucher and return and a check for the amount will be sent you."

That must have been before it. Do you remember of getting a letter before getting the check, with voucher for you to sign and send back?

A. Yes, sir. I think so.

Q. And you signed that and sent it back?

A. I think so.

Q. Now have you ever received a patent? You haven't received any final receipt have you, at any time?

A. Not as much as I know.

Q. Now then, do you remember the time that Mr. Neuhausen was up in Prineville in 1904?

A. Yes, sir.

Q. You know him don't you, that gentleman sitting there?

A. Yes, sir.

Q. About that time, did you receive a letter from Dr. Gesner?

456 A. Yes, sir.

Q. Is that the letter?

A. I couldn't say; I guess it is. It has my name on it.

Q. What did you do with the letter which you received?

A. I gave it to Mr. Neuhausen.

Mr. HENEY: You don't care about our making the connection. It can be admitted that that is the letter given to Neuhausen. It is the same one that was used at the other trial.

Mr. BENNETT: All right; that is in Gesner's handwriting.

Mr. HENEY: We will offer this letter in evidence.

Marked "Plaintiff's Exhibit 57."

Mr. HENEY: The envelope is postmarked "Prineville, May 12, 1904, Oregon." "Christian Feuerhelm, Prineville, Ore." Postage stamp on it. Now the letter reads as follows:

"PRINEVILLE, ORE., *May* 13, 1904.

Mr. Feuerhelm, Prineville, Ore.

DEAR SIR: That timber claim of yours and all of the balance I have got to throw them up. I am sure we would get into trouble over them before we got through with them, and then be turned down on them. I know that Mr. Moody and The Dalles Land Office are laying for us. I do not want to get into any trouble over them, and do not want any of my friends to get into trouble. You go before Mr. Biggs and relinquish your claim.

Yours respt., V. GESNER."

—. Now, after getting that letter, did you do as requested? Did you go and relinquish?

A. Yes, sir.

Q. Is that your signature?

A. Yes, sir.

Q. Before whom did you go?

A. Before Mr. Biggs.

Mr. HENEY: We offer this relinquishment in evidence. Marked "Plaintiff's Exhibit 58."

457 Mr. HENEY: The relinquishment is dated May 14, 1904, and reads as follows:

"STATE OF OREGON, *County of Crook*, ss:

I hereby relinquish to the United States all my right, title and interest in and to the S.E. ¼ Sec. 28, Tp. 15, S. R. 19, E. W. M. the same being my timber and stone claim.

Dated this 14th day of May, 1904.

CHRISTIAN FEUERHELM. [SEAL.]

Witnesses:
M. R. ELLIOTT.
M. R. BIGGS.

Subscribed and sworn to before me this 14 day of May, 1904.
M. R. BIGGS,
Notary Public for Oregon."

Q. Did you have any talk with Biggs about it at the time you relinquished. What did you say to him when you went in and what did he say to you?

A. Well, I told him that I was going to relinquish. I think that is just about all was said. I don't know exactly what more. I can't remember now.

Q. Now do you remember any conversation with Biggs about the note at the time you signed it?

A. No.

Q. About the amount of it?

A. About the amount of the note?

Q. Yes.

A. It was $500.00 on the note, as much as I remember.

Q. $500.00?

A. Yes, sir.

Q. Do you remember any talk with Biggs, as to why it was $500.00?

A. No, I couldn't say.

Q. You don't remember that now?

A. No, sir.

458 Q. Now, the day that your final proof money came back to you, that check, did you see Dr. Gesner before you went to Biggs with it?

A. Yes, sir.

Q. And what did you say to him?
A. I asked him where I should pay the money back to get the note, and he told me to go back to Mr. Biggs and pay it there.
Q. Did you tell Biggs why you were relinquishing at the time you relinquished?
A. No, I don't believe. I didn't say much.

Whereupon proceedings herein were adjourned until to-morrow morning at 9:30 o'clock.

459 PORTLAND, OREGON, *September* 14, 1905—9.30 a. m.

CHRISTIAN FEUERHELM resumes the stand.

Cross-examination.

Questions by Mr. BENNETT:

—. Mr. Feuerhelm, how long did you say you had resided up in that Prineville country?
A. I think it is from sixteen to eighteen years.
Q. And you say you are well acquainted with this land?
A. Yes, sir.
Q. With this timber land up in that country?
A. Yes, sir.
Q. You have been over it a great many times?
A. Yes, sir.
Q. Knew every foot of it practically?
A. Yes, sir. Pretty near.
Q. Now, there was quite a timber craze up in that country during the year 1902, wasn't there?
A. How is that?
Q. Quite a timber craze. I say, quite a timber craze. A great many people were crazy about taking timber?
A. Yes, sir.
Q. A great many people coming in from the east and taking timber?
A. That is what I heard.
Q. And you concluded that you would like to have a timber claim?
A. Yes, sir.
Q. And you heard something about Dr. Gesner loaning money to prove up on timber claims?
A. Yes, sir.
Q. You don't know whom you heard that from?
460 A. Well, I just heard it talked in town.
Q. I say you don't know whom you heard it from?
A. No, sir.
Q. You don't know who told you?
A. No, sir.
Q. It wasn't Mr. Biggs or any of these defendants?
A. No, sir.
Q. I say, it wasn't any of these people?

A. No, sir.
Q. And you went to him to inquire about it, did you?
A. Yes, sir.
Q. Now, you asked him if he would loan money on timber claims, did you?
A. Well, I didn't really know if I asked him that question at all. I think I just asked Mr. Gesner if he would buy it after proving up.
Q. And he told you that probably he would?
A. Yes, sir.
Q. If you wanted to sell?
A. Yes, sir.
Q. And he told you he would be willing to give as much as $500. for it?
A. Yes, sir.
Q. I suppose you can't remember exactly the words that he used, or exactly the words that you used?
A. No, It is so long ago I could not remember every word.
Q. Now, when you told him that you had the money of your own that you could prove up with, didn't you also tell him that you might want to use that for something else?
A. No, I don't believe that hasn't been said; he said he would let me have the money; that is understood.
461 Q. Didn't he tell you at that time when you asked him about that, didn't he tell you that he would loan you the money; that it would be all right; that he would loan you the money?
A. No; that hasn't been said.
Q. You don't remember of that?
A. No, sir.
Q. Well, do you remember whether anything was said about he having the grass for interest or not?
A. No, sir. It hasn't been said.
Q. What say?
A. That hasn't been said; not that I remember.
Q. There wasn't anything said about that that you remember?
A. No, sir. Not what I remember.
Q. What say?
A. I say not what I remember.
Q. You paid your own filing fees did you?
A. Yes, sir.
Q. Now then, at the time you had this talk with him, did he say how much it would be worth to him; how much he could afford to pay for it. That he could afford to pay $500 for it?
A. That is all Mr. Gesner said.
Q. That is right is it?
A. That is right.
Q. He said he could afford to pay $500 for it?
A. Yes, sir.
Q. And in the meantime, he would loan you the money and take your note for it, didn't he say?

A. Well, Mr. Gesner didn't say that. He told me to go into Mr. Biggs' office then.

Q. Didn't he tell you in the meantime, that he would loan
462 you the money and take your note for it?

A. No, he told me to go into Biggs' office, and Biggs would fix that.

Q. Didn't you testify in the first trial; "Q. And in the meantime, he would loan you the money and take your note for it? A. Yes, sir."

A. I don't believe I did.

Q. You don't think you did. You gave a note for the money, did you?

A. Yes, sir.

Q. You don't remember how long the note was drawn for?

A. No.

Q. You don't remember whether you gave a mortgage or not?

A. No, sir.

Q. Now, when you say you intended to sell it to him, you intended to sell it to him, if he would give you as much as anybody else, didn't you?

A. No, it hasn't been said.

Q. No, but that is what you intended? You intended if he would give you as much as anybody else for the land, that you would sell it to him?

A. No, I didn't say it nor didn't thought.

Q. You don't know what you intended?

A. No.

Q. Didn't you intend at that time, that if anybody else would give you more for it, you would sell to them?

A. I guess I probably would.

Q. Now, did you have a talk with Mr. Biggs after you got back from being before the Grand Jury down here, he and you alone being present, in his office, in which you told him that they got you down here before the grand jury and threatened to indict you,
463 and that you got very much scared?

A. No, I didn't say that.

Q. Didn't you tell him at the same time and place that, after they threatened to indict you, you finally answered "yes" to everything they asked you, or words to that effect?

A. I didn't say such things at all.

Q. Now, did you have such a conversation with Mr. Biggs in front of Wurzweiler's store—the corner of Wurzweiler's store?

A. Yes, we had some talk in there.

Q. Did you tell him there that they threatened to indict you and that you answered "yes" to everything they wanted you to answer "yes" and "no" to everything they wanted you to answer "no" to or words to that effect?

A. No, I didn't say that.

Q. You didn't have any sawmill up there?

A. No, sir.

Q. You didn't expect to cut the timber off yourself then?

A. No, sir.

Q. But you thought living up in that country, you were just as much entitled to a timber claim as anybody?

A. Yes, sir.

Redirect examination.

Q. It was one of those parties who filed up there who told you that Gesner was loaning the money, wasn't it? Or would buy the claims?

A. Well, I don't know whether it was some of the parties that took up claims or not. I just heard it on the streets.

Q. You don't remember whom you heard it from?

A. No, sir, I couldn't tell.

Q. It might have been Biggs?

464 A. No, sir.

Q. Well, it might have been any one of these parties who filed?

A. Well, I couldn't tell.

Objected to as leading.

Q. It might have been Henry Hudson?

A. No, it wasn't him; I heard just the general talk on the streets is all I can say.

Q. You say there was general talk on the streets; name one person that you heard say it.

A. I cannot name a single one.

Q. Did you hear it from more than one?

A. Yes, sir; I heard it from more than one, but I couldn't remember which it was.

Q. How much of a place is that?

A. Prineville?

Q. Yes.

A. Oh, it aint a very big town. I don't know; about 800 population I guess—I don't know exactly.

Q. Nearer 200 isn't it than 800?

A. Well, I couldn't say exactly how many population there is in Prineville.

Q. You may tell us how many saloons there are now, and we will guess it.

Mr. BENNETT: I object to that your Honor. You might ask him how many saloons there are in Portland.

Mr. HENEY: I wouldn't be so impertinent, Judge, as to ask that.

Q. Wasn't it your understanding when you left Gesner and went to make that filing——

465 A. I didn't understand.

Q. When you left Gesner and went to make that filing——

A. Yes, sir.

Q. Wasn't it your understanding that, by doing that, you had given him to understand that you agreed to his terms and would let him have the land for the $500.

Objected to as leading and putting words in the witness's mouth.

The COURT: Yes, I think that is objectionable.

Mr. HENEY: I must concede that it is leading, your Honor.

COURT: I didn't see any objection to propounding a leading question, but I don't think the witness will quite understand that question.

Q. What was your understanding when you left Gesner, and when you filed on a claim as to whether you had promised that you would let him have it when you got the title?

A. Well, there was no real promising.

Q. You didn't say that?

A. No, sir.

Q. But what was your understanding as to what he believed, and what did you believe?

A. I believed nothing else, but I went in to file on the claim.

Q. Did you think he was furnishing you the money for you to get the claim and sell it to anybody you pleased?

A. Well, I didn't thought.

Q. You didn't think that?

A. No.

Q. What did you think?

466 A. I think I didn't thought nothing.

Q. Well, you did do some talking, didn't you?

A. Well, very little.

Q. Did you think he was loaning you the money to take up this claim to sell it to Morrow & Keenan, after you got it, or to somebody else up there?

A. I never thought.

Q. You never thought?

A. I never thought such.

Q. You didn't think that?

A. No, sir.

Q. What did you think? What did you think he was loaning you the money for?

A. I guess probably that he would get the land. That is all I could say.

Q. Did you ever have any idea of selling it to anybody else?

A. Oh, just probably sometimes I had the idea.

Q. Well, now, at the time you filed, that you signed that paper, did you have any intention of selling it to anybody else except Dr. Gesner?

A. No, I didn't have any intention, I guess.

JUROR: I didn't understand.

Q. What was the answer? Did you have any intention of selling it to anybody except Dr. Gesner at the time you filed?

A. I didn't really understand, Mr. Heney.

Q. You don't understand the question. At the time you filed, did you intend to let Dr. Gesner have the land when you got the title—at the time you were signing that paper—filing?

A. I guess I thought so.
Q. You did think so?
A. I think so.
467 Q. Now, were you ever threatened by any Government officer with indictment?
A. Not as much as I know.
Q. You never heard anyone say that?
A. No.
Q. Were you before the Grand Jury in February?
A. Yes, sir.
Q. Anybody threaten you there with indictment?
A. No, sir.
Q. Now, give the exact language, as near as you can recollect it, or the substance of it, as near as you can recollect it, that Mr. Gesner used when you went to him and asked him about letting people have the money up there to take up claims.
A. Well, I didn't know; I didn't hear such conversation from Mr. Gesner that he would let people have it.
Q. When you went and talked to him about getting money from him, tell us what it was that you said, and what he said, to the best of your recollection; just what was said.
A. Well, I answered this question a little while ago.
Q. I know it, but I want you to answer it again now; your own way. I want you to tell what it was.
A. Well, I went over to him and asked him if he wanted to have me to take up a claim and he says "yes" and that is all I remember. He told me to go into Biggs' office and he would fix it.
Q. Well, wasn't something said about the money—or whether he would buy it or not?
A. Yes, sir. He told me that he would give $500. for it after I made a deed and that is all we spoke together.

Recross examination:

Q. Told you he would give you $500. for it if you wanted to sell it when you got a title, didn't he?
A. How is that?
468 Q. He said he would give $500. when you got a title, didn't he?
A. He told me he would give $500. for it when he got a deed, you know.
Q. If you wanted to sell it. Ain't that what he said?
A. That might be said. I couldn't say exactly.
Q. You can't say exactly about that?
A. No, sir.
Q. Well, you have stated here to-day that that was what he said, haven't you?
A. Well, I forget things you know, right here.
Q. I believe you said awhile ago, that you don't undertake to say exactly what he said about any of these things; you don't know that

you can remember the exact words that he used about any of these matters?

A. No.

Redirect examination:

Q. Now, did he say "if you want to sell it" or did he put that in there at all?

A. Well, I can't remember if he did say that.

Q. Well, What is your best recollection as to whether he did or did not say "if you want to sell;" whether he put that in? What is your best recollection as to whether he did or did not?

A. Well, I can't answer that.

Q. You can give your best recollection.

A. I think that hasn't been said.

469 Recross examination:

Q. Well, you testified awhile ago that you thought it had been said, didn't you?

A. Well, I tell nothing but the truth, but that is my memory.

Q. I know you don't aim to tell anything but the truth, but you can't remember?

A. No, sir. I can't remember. If I did say it, I don't remember. I am short on memory.

Q. You don't know whether he said that or not.

Witness excused.

470 Mrs. Lettie Watkins, being called as a witness testified that she was the wife of John S. Watkins and that she made a timber filing in June or July, 1902, and that her husband first spoke to her about it, whereupon the witness was asked the question: "What did he say?" To this the defendants objected upon the ground that it was incompetent, hearsay, and not binding upon any of the defendants. The objection was made as to each of the defendants separately, but the objection of each of the defendants was overruled and each defendant then and there excepted, whereupon the witness answered, "Well he said that Mr. Biggs wanted us to go and take timber claims, or something like that." Whereupon the following questions and answers were given subject to the same objection and exception on the part of each of the defendants. Q. Do you remember what else he said about it as to what the terms were or anything of that sort; what you were to make out of it? A. Well, my understanding was we were to make about $75.00. Q. And how were you to make it? A. Well, from Gesner and Williamson, was my understanding. Q. Is that what your husband told you? A. I think so. Q. Did he say what you were to do with the land when you got the title? Did your husband tell you what you were to do with the land when you got the title? A. Yes, sir. Q. What did he say? A. To sell it to Gesner and Williamson.

The following is all of the testimony of the aforesaid witness, Mrs. Lettie Watkins introduced at the trial.

471 Mrs. LETTIE WATKINS, a witness called on behalf of the government, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. HENEY:

—. You are the wife of John S. Watkins?
A. Yes, sir.
Q. In June or July, 1902, you made a filing on a timber claim?
A. Yes, sir.
Q. Who first spoke to you about it?
A. My husband first told me about it.
Q. What did he say?

Mr. BENNETT: This all goes in subject to the same objection, that it is incompetent and hearsay and not binding upon any of these defendants. We make the objection as to each of the defendants.
Objection overruled. Defendants except.

Q. What did he say?
A. Well, he said that Mr. Biggs wanted us to go and take timber claims, or something like that.
Q. Do you remember what else he said about it as to what the terms were or anything of that sort; what you were to make out of it?
A. Well, my understanding was we were to make about $75.
Q. And how were you to make it?
A. Well, from Gesner and Williamson, was my understanding.
Q. Is that what your husband told you?
A. I think so.
Q. Did he say what you were to do with the land when you got the title? Did your husband tell you what you were to do with the land when you got the title?
A. Yes, sir.
472 Q. What did he say?
A. To sell it to Gesner and Williamson.
Q. You went up to the timber with him to look at it, didn't you?
A. Yes, sir.
Q. And who went along?
A. Wilford Crain and his wife, George Gaylord, and my husband and myself.
Q. And Wilford Crain's wife is your daughter?
A. Yes, sir.
Q. Now when you got up there whom did you meet up there?
A. We met Mr. Gesner, Mr. Williamson and Charles Graves and one of the Wakefield boys.
Q. Now, will you tell the jury all that happened after you got up there—all that you recollect of what happened?
A. Well when we got there, Mr. Williamson and Mr. Gesner were there. When we got to the timber we met Mr. Gesner, Mr. Williamson and Mr. Graves, and one of the Wakefield brothers; and Mr. Williamson says, "Now we are in about the middle of the section

and the timber is about the same all over" is all that I remember of hearing.

Q. Now, do you remember of seeing Mr. Williamson do anything?

A. Yes, sir.

Q. What?

A. He took my husband's note book and put down some numbers in it.

Q. Do you remember what he said, if anything, when he was putting the numbers in there, or before putting them in?

A. Well, I remember hearing him say that he would put the numbers down in the book.

Q. You went into file, didn't you, on this land?

A. Sir?

Q. You went in before Mr. Biggs to file on this land?

A. Yes, sir.

473 Q. And when you got there (I show you government's exhibit 28) you signed these two papers there?

A. Yes, sir; that is my handwriting.

Q. And do you remember being sworn to them?

A. Yes.

Q. Now do you remember any conversation there between Mr. Biggs and your husband or Mr. Biggs and you? Can you remember any of the talk that took place?

A. No, sir.

Q. Do you remember as to whether anything was said to you about your right to make this statement in here: "that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever by which the title I may acquire from the government of the United States may inure in whole or in part to the benefit of any person except myself."

Do you remember any talk about that?

A. No, sir; I don't remember.

Q. Now, at the time you signed this paper what did you intend to do with the land when you got title to it?

Mr. BENNETT: Of course, that is all subject to that same general objection, your Honor.

A. Well, my understanding was that it was to go to Williamson and Gesner.

Q. And for what consideration? For how much?

A. About $75.

Q. And did you prove up on the land?

A. No, sir.

Q. Did you relinquish?

A. Yes, sir.

474 Q. Why did you relinquish? Did anybody tell you to?

A. Mr. Gesner told my husband that he thought best for not too many of the family to prove up—something to that effect.

Q. Did your husband tell you that?
A. Yes, sir, that is the reason that I relinquished.
Q. That is the reason that you relinquished, was it?
A. Yes, sir.
Q. Did you sign the paper at the time?
A. At the time I relinquished?
Q. Yes.
A. Yes, sir.
Q. That was before Mr. Biggs also?
A. Yes, sir.

(The paper shown the witness was government exhibit 32).

Q. Do you remember who all went in there that day at the time you went in to relinquish?
A. Well, I think my daughter, Mrs. Crain, was there, and Mr. Watkins and myself, was all that I remember of distinctly, at the time.
Q. Do you recollect as to whether you saw Wilford Crain or Gaylord there?
A. Yes, sir; they were there in town but—yes, Mr. Gaylord was there too when I relinquished.

Mr. BENNETT: What is the date of that, Mr. Heney.
Mr. HENEY: The date is December 8.

Q. Mr. Gaylord signed your relinquishment as a witness, didn't he?
A. Yes, sir; he is one of my witnesses.
Q. And do you remember Mr. Crain being there—Wilford Crain?
A. Well, I am not sure whether he was in the office at the time or not; I ain't sure.
Q. You remember seeing him in town?
A. Yes, sir; he was in town.
Q. What day?
A. That day.
475 Q. Were you there while your husband was proving up?
A. I think I was, but I ain't sure.

Cross-examination.

Questions by Mr. BENNETT:

Q. You never had any talk with Mr. Biggs in relation to the matter at all, did you, Mrs. Watkins?
A. No, sir.
Q. Nor you never had a talk with Dr. Gesner?
A. No, sir.
Q. Nor with Mr. Williamson?
A. No, sir.
Q. All you know about the matter you got from your husband?
A. Yes, sir.
Q. You didn't hear any talk about any money or the loan of any

money, or what was to be done with the land, or anything of that kind, except what you heard your husband say?

A. No, sir.

Q. You left that matter largely to him, didn't you? Your understanding wasn't very clear as to just what was to be done, was it?

A. Well, I just left it to him.

Q. Now, he told you that Biggs said that Gesner would loan the money on the claim, did he, or did he say anything about the loan of the money, say anything about that one way or the other—your husband, to you?

A. Why, I couldn't say.

Q. What say?

A. I don't remember, but I think that he did.

Q. You think he said something about that, but, you don't remember and don't remember what if he did?

A. Yes; he said—my understanding was that they were to furnish the money.

Q. And did he tell you what the understanding was about
476 the grass and the interest?

A. Well, I heard something about that, but I don't remember just what it was.

Q. Heard something about that about the time?

A. Yes, sir.

Q. When your husband was telling you about what Biggs said?

A. I think so.

Q. But you don't remember just what it was?

A. No; not exactly.

Q. Your husband told you that Biggs said that if you wanted to sell, Gesner and Williamson would buy the claim?

A. Yes, sir.

Q. And that they would pay enough for it so that there would be $75 profit?

—. ——.

A. Were you a witness at the last trial of the case?

A. Sir?

Q. Were you a witness? Have you ever been a witness before?

A. No, sir.

Redirect examination.

Q. Did he say "if" you wanted to sell, or did he say that he would give you the $75; did he put in any "if" about it? What was your understanding,—that you were to sell to Gesner, or that there was any "if" about it?

A. Well, my understanding was that we was to sell to Gesner.

Witness excused.

477 And thereafter one PAUL FRANK was called as witness and testified that he was in the employ of Morrow and Keenan in the years 1902 and 1903 and was engaged in tending camp and herding their sheep; that they had the road sections 9, 11, 13, 15 ,17, 23, and 25 in township 15-19 leased in the year 1902.

Whereupon the following question was asked: What controversy in regard to the grazing took place in 1902 between you and Williamson and Gesner's herders," to which the defendants objected as immaterial and incompetent, but the objection was overruled to which ruling the defendants excepted and their exception was allowed and the witness answered, "I told them these fellows had this land rented, and I would like to have the feed on those sections until fall. They said we hadn't the lease yet that it hadn't been issued, and we would have to wait, and that they told them to go ahead and feed it off until it was settled. Q. "Who told them?" Same objection, ruling and exception. A. Williamson and Gesner. Q. By whom was that said? A. Chester Starr. Q. What position did he occupy with Williamson and Gesner? A. They always referred me to Chester Starr, supposed to be running the sheep out there. Q. Do you remember having a talk with Chester Starr in 1903 in regard to getting the lines of the range settled where Morrow and Keenan's sheep should feed? Objected to as incompetent, immaterial and not binding upon the defendants, the objection was overruled and to the ruling the defendants excepted and the witness answered the question, Yes sir." Whereupon the question was asked, "What did he say in regard to that?" same objection ruling and exception and the witness answered, "well, he told me they had all the water on these even sections and he would not give any satisfactory answer the first talk I had with him."

Thereupon the attorneys for defendants moved to strike
478 out the answer of the witness on behalf of each of the defendants as immaterial and incompetent, but the objection was overruled and the defendants excepted, the Court saying that the word "satisfactory" used by the witness was immaterial; but that the fact that he did not give him any answer was competent and that the witness better explain what he means by the word "satisfactory."

Whereupon the witness asked, "Satisfactory answer?"

The COURT: "Yes, did he give you an answer?" To which the defendants then and there objected as incompetent and immaterial, the objection was overruled and the witness answered, "No sir, he never give me any answer at all. I caught him in there on 17 and I says, "you folks have been in here trying to feed out this range—" Q. What did he say to that? Same objection ruling and exception. A. "And I wanted to get an even show at it that year; and so we got together afterwards and made lines."

The following is all of the testimony of the aforesaid witness PAUL FRANK introduced at the trial.

479 PAUL FRANK Sworn on part of the Government testified:

Direct examination.

By Mr. HENEY:

Q. Mr. Frank, where do you live?
A. Madras.
Q. How long have you lived in Oregon?

A. About six years.
Q. Did you live in Prineville or the vicinity of Prineville at one time in 1902?
A. Yes, sir.
Q. Whom were you working for?
A. Morrow and Keenan.
Q. What were you doing for them?
A. I was night watch there and packer, and kind of foreman of the sheep.
Q. During that time where were the sheep being herded in the summer time?
A. In and around about Lookout Mountain, Horse Heaven and Summit Prairie.
Q. Did you have any trouble with the cattlemen along there in 1902?
A. No sir.
Q. Did you have any trouble with other sheepmen with reference to the grazing, with Williamson, Wakefield and Gesner?

Mr. BENNETT: What is the purpose of that testimony?
Mr. HENEY: It is to show the purpose and motive of the defendants in committing the offense charged in the indictment.
Objected to as immaterial and incompetent.
Overruled. Defendants except.

A. Yes, sir.
Q. You may state what the trouble was?
480 A. Well, we were in there, had these sections leased from the road company, in Horse Heaven.
Q. Do you remember which sections you had leased?
A. Yes.
Q. Which ones?
A. Nine, eleven, thirteen, fifteen, seventeen, twenty-three and twenty-five.
Q. You had number one also, hadn't you?
A. Well it has passed my mind; I don't remember about one.
Q. It was in township 15-19 you are talking of that you had these sections?
A. Yes, sir.
Q. State what the condition of the range was with reference to those sections in relation to water, as to whether there was plenty of water upon those road sections, or as to whether it is necessary to reach water that was on the even sections in there?
A. Well, it was necessary to reach water on the even sections on most of the land.
Q. It was necessary?
A. Yes.
Q. How often do sheep have to be watered in the summer time?
A. About every three or four days.
Q. Do you remember as to any particular places where springs or creeks were on even sections adjoining any of those sections you had under lease?

A. Yes, sir.
Q. Where?
A. To the best of my knowledge 24 and 26; there was water on even sections, that would lay the way the creek sloped, would leave 25 on the east side of the creek. There is a small creek on 25.
Q. That is between 25 and 24?
A. Yes and 26 also to my best knowledge.

481 Q. What controversy in regard to the grazing took place in 1902 between you and Williamson and Gesner's herders?

Mr. BENNETT: Of course this all goes in subject to our objection, Your Honor.

A. I told them these fellows had this land rented, and I would like to have the feed on those sections until fall. They said we hadn't the lease yet, that is hadn't been issued, and we would have to wait, and that they told them to go ahead and feed it off until it was settled.
A. Williamson and Gesner.
Q. By whom was that said?
A. Chester Starr.
Q. What position did he occupy with Williamson and Gesner?
A. They always referred me to Chester Starr.
Q. They always referred you to him?
A. Yes, supposed to be running the sheep out there.
Q. Had you been working for Morrow and Keenan before the year 1902 up there?
A. Yes, sir.
Q. Did they have those particular sections under lease before 1902?
A. Not to my knowledge they did not.
Q. I mean did Morrow and Keenan have them?
A. No, sir.
Q. The ones that you were on?
A. Not that I know of.
Q. Had you been grazing in that part of the country?
A. No, sir.
Q. That is your first year in there?
A. Yes, sir, 1902.
Q. That was their first years in there so far as you know?

482 A. Yes.

Mr. BENNETT: Whose first year?
Mr. HENEY: Morrow and Keenan's.

Q. Were you threatened in any way by cattlemen during the year 1902?
A. No, sir.
Q. In regard to grazing on the Horse Heaven Range?
A. No, sir.
Q. What herders do you remember of herding there for Williamson and Gesner at that time?

A. There was Trace Beard and Henry Beard and a herder by the name of Goodwin and Parkey.

Q. Alfred Parkey?

A. Yes.

Q. You have seen him here around the court house?

A. Yes.

Q. To-day?

A. Yes.

Q. Have you seen Chester Starr here since you have been here this time?

A. I saw him here three or four days ago.

Q. Do you remember having a talk with Chester Starr in 1903 in regard to getting the lines of the range settled where Morrow and Keenan's sheep should feed?

A. Yes, sir.

Objected to as incompetent and immaterial.

Overruled. Defendants except.

Q. What did he say in regard to that?

Same objection.

The COURT: Who was that?

Mr. HENEY: Chester Starr, manager for Williamson and Gesner.

Objection overruled. Defendants except.

483 A. Well, he told me they had all the water on these even sections and he would not give me any satisfactory answer, the first talk I had with him.

Mr. BENNETT: We move to strike out the answer of the witness on behalf of each of the defendants as immaterial and incompetent.

Objection overruled. Defendants except.

The COURT: The word "satisfactory" used by the witness is immaterial; but the fact that he did not give him any answer is perfectly competent. The witness better explain what he means by that.

A. Satisfactory answer?

The COURT: Yes, did he give you an answer?

A. No, sir, he never gave me any answer at all. I caught him in there on 17, and I says, "You folks have been in here trying to feed out this range——"

Objected to.

Q. What did he say to that?

A. And I wanted to get an even show at it that year; and so we got together afterward and made lines.

Mr. BENNETT: Speak louder; I can't hear you.

A. We got together afterwards and made lines.

Q. Were you there in 1904 for Morrow and Keenan?

A. No, sir.

Whereupon a recess was taken until 2 o'clock this afternoon, September 15th, 1905.

484 SEPTEMBER 15—2 o'clock p. m.

Trial resumed. PAUL FRANK on the witness stand.

Cross-examination.

By Mr. BENNETT:

Q. How long did you herd sheep for Morrow and Keenan?
A. About three months.
Q. What time in the year did you commence to herd for them?
A. It was along in June, 1901, May or June; I could not say which.
Q. May or June of 1901?
A. Yes, sir.

Mr. HENEY: You mean 1901 or 1902.

A. 1901.
Q. Were you herding in 1902?
A. No, sir.

Mr. HENEY: What were you doing in 1902?

A. Foreman and packing.
Q. You were working for them then, in 1902?
A. Yes.
Q. Now, whereabouts was Morrow and Keenan's main ranch in 1901 and 1902?
A. In 1901?
Q. Yes.
A. Well, they ranged in about Summit Prairie that year.
Q. That was about how far from this Township 15-19?
A. I should judge it would be about three miles or four.
Q. How much?
A. Three or four miles.
Q. Did they go down on the 15-19 in 1902, at all, or were they above that?
A. No, sir, I think not.
Q. Now, in 1902, they still ranged up about Summit Prairie didn't they?
485 A. No, sir—well, yes, they ranged all through that country.
Q. They still ranged up about Summit Prairie?
A. Yes.
Q. Were their headquarters up there in 1902?
A. No, sir.
Q. Up about Little Summit Prairie?
A. No, sir.
Q. Was it between Township 15-19 and Little Summit Prairie?
A. Our headquarters?
Q. Yes.
A. No, sir, they were not.
Q. Where were their headquarters that year?

A. I think their headquarters was Sam Smith's place.

Q. Didn't you stop there at Gesner and Williamson's shearing plant?

A. When?

Q. During the summer of 1902.

A. I have passed by there and stopped in there, yes.

Q. Did you make that a kind of headquarters and cook there?

A. No, sir; I did not. It never was my headquarters since I was with them.

Q. Never was your headquarters while you were there?

A. No, sir.

Q. Where is this Sam Smith's place, shearing plant?

A. Six miles west, I would call it.

Q. Six miles west?

A. Yes, that's what I would call it.

Q. Six miles west in Township 15-18.

A. That is what I would think it was.

Q. Or 15-17?

A. 15-18 or 15-17, right close to it.

486 Q. About the line between 15-18 and 15-17? If this was 15-19, your headquarters would be over there somewhere? (referring to the map).

A. West, yes, sir.

Q. Suppose this was township 15-19, your headquarters would be over here somewhere, wouldn't it?

A. Yes, sir.

Q. Along about the line between 17 and 18?

A. Somewhere along there; I could not say for sure.

Q. Would that be on the Ochoco?

A. Yes, sir.

Q. Did not Morrow and Keenan have their sheep at the Williamson and Gesner in 1901?

A. Yes, sir they did.

Q. How long were they there at that time?

A. I was there seven or eight days.

Q. You ran sheep there a month that year?

A. Not the band I was with.

Q. Then you don't know about the other band?

A. I could not say as to the other band.

Q. The band you were with were there awhile?

A. Yes.

Q. What time in the summer did you commence to herd the sheep in 15-19 in 1902?

A. What time in the summer?

Q. Yes.

A. I left there early in the spring and went on beyond here and tried to save it until fall.

Q. What time did you leave there?

A. Along in July or somewhere—oh, in 1902, you mean?

Q. Yes, in 15-19.

A. Yes.

487 Q. What time did you leave 15-19?
A. Probably the latter part of July.
Q. That is not in the spring is it?
A. In the summer then.
Q. The latter part of July.
A. Yes.
Q. Pretty late in the summer, wasn't it?
A. It might have been.
Q. When did you come there first that year?
A. Along the last of June.
Q. And staid there from the last of June to the latter part of July?
A. Well, I was in there with two bands and I had them moving around all the time.
Q. You never had been herding any of Morrow & Keenan's sheep in that township before the last of June that year?
A. Never herded them any time that year.
Q. Well, you did not bring them into township 15-19 until the last of June 1902 did you?
A. No, sir, I did not.
Q. Never have been in there at all, so far as you know before that time?
A. Not to my knowledge of it.
Q. Now, you say they have some of those sections leased? When did they lease those sections?
A. They leased them along early in the spring of 1902.
Q. What say?
A. Early in the spring so we could use this for summer use.
Q. Don't you know you did not lease them until late in the season?
A. No, sir, I don't know anything about it.
Q. You don't know anything about when they did get the leases, then?
488 A. I know when they applied for it.
Q. You knew when they applied for them?
A. I knew about when.
Q. Do you know about when they got their leases?
A. No, sir, I don't.
Q. Do you know whether they have got their leases when you were there at all, or not?
A. Yes, sir, they had.
Q. During the year 1902?
A. Yes, sir.
Q. Don't know what time in 1902?
A. No, sir, I don't.
Q. Was it after you came back there in the fall?
A. I think it was before we got back in the fall.
Q. What say?
A. I think it was before we got back in the fall.
Q. What time or about what month was it, do you think, they applied for it?

A. I think they applied for it along in April or March, somewhere along there.
Q. You think they applied for it along in March or April?
A. Probably so, I could not say.
Q. Do you know whether they did or not?
A. No, sir.
Q. Do you know when they did apply for it?
A. I do not, no, sir.
Q. You have no knowledge about that at all?
A. I have a little yes, sir.
Q. What is your knowledge about that?
A. My knowledge is this, that before we started the summer range, they told me they had rented these sections.
Q. They what?
489 A. That they had rented those sections.
Q. Rented it or applied for it?
A. That they had rented it.
Q. When was it they told you that they had rented it?
A. I could not say; it must have been along in May probably.
Q. That is the first you heard about it, was it?
A. No sir, it was not.
Q. When was the first you heard about it?
A. The first I heard about it was in 1901 when I was at the shearing plant.
Q. Now, you say those sections are dry sections?
A. All of them?
Q. Yes.
A. Some of them I suppose, are dry.
Q. Do you know whether any of them are dry or not. Is section *l*ine a dry section?
A. No, sir, I think not.
Q. The head of Wolf Creek runs across section 9, don't it?
A. Not exactly.
Q. Does it run over it at all? Does Wolf Creek or any of its tributaries head in section 9?
A. Yes.
Q. Then there is plenty of water in section 9 isn't there?
A. I always found enough there.
Q. You always found it that way?
A. Yes.
Q. How is section 11?
A. 11 I should call a dry section.
Q. Was there any water on section 11?
A. Not to my knowledge no, sir.
Q. You don't know whether there is any water on that section or not?
A. I never seen any.
490 Q. How section 17?
A. That is dry too, almost, you might say.
Q. What say?
A. That is almost dry.

Q. Isn't there a big spring on section 17?
A. There is a small spring there.
Q. Is there not a big spring that runs down there a hundred yards?
A. You couldn't water sheep at it, I don't think; I never could.
Q. Does the Wickiup Creek head on Section 17?
A. Yes, sir; but there is not much water in the head of Wickiup.
Q. Isn't there a big spring that gives plenty of water on the head of Wickiup?
A. Not that I ever found.
Q. Did you ever look to see whether there was or not?
A. Yes, sir; I have been all over it.
Q. Then you undertake to say there is not a big spring on the southwest quarter of Section 17?
A. I never found it if there is.
Q. You say you know whether there is a spring there or not, don't you?
A. I know there is one spring there, yes, sir.
Q. A big spring?
A. No, sir.
Q. You say there is no big spring there then?
A. Not to my knowledge, there is not.
Q. I am trying to get at whether you know or not.
A. No, I don't know, I guess.
Q. How about Section 15? Does Horse Heaven Creek run across section 15?
A. Well it heads in the east side of it, I think.
Q. Heads where?
A. On the east side of it, I think.
Q. And runs clear across the section, doesn't it?
491 A. I think not; it runs across about eighty acres of it, I think.
Q. There is plenty of water on that section then, isn't there?
A. Yes, sir, that is fairly watered.
Q. How about section 13; do you claim that is a dry section?
A. Yes.
Q. No water there at all, is there?
A. There is a very little water there in the spring.
Q. How late in the spring?
A. Oh, about the last of July.
Q. Oh, in the spring, about the last of July.
A. In the summer.
Q. Whereabouts is that spring that you say lasts until about the last of July?
A. There is a creek there; it is a creek that runs down——
Q. Is that the head of Horse Heaven Creek, big Horse Heaven?
A. No, sir, it is a little branch that goes through.
Q. Does it run down into the Horse Heaven Creek?
A. It does, I suppose, early in the spring, but I never saw it run into Horse Heaven.
Q. It lasts until the last of July.

A. Somewhere along in July.
Q. How about section 23; does Horse Heaven Creek run across 23?
A. No sir, I think not.
Q. No branch on it at all?
A. Little Horse Heaven might.
Q. Didn't Big Horse Heaven run across the southeast corner of the southeast quarter of section 23?
A. I could not say.
Q. You don't know whether it does or not. Was there a spring up on the northwest quarter of section 23?
A. Yes, sir.
Q. Then that is a pretty well watered section, isn't it?
492 A. Fairly watered.
Q. Now, about section 25, is there a spring on section 25 on the northwest quarter?
A. I could not tell you.
Q. What say?
A. I could not tell you.
Q. You don't know about that, whether there is or not?
A. There is a spring there, but they always claimed it was on the even section.
Q. Who claimed it was on the even section?
A. Williamson & Gesner's men.
Q. You mean Chester Starr?
A. Yes, sir.
Q. Did you ever have any talk about these things with anybody except Chester Starr up there?
A. No sir. Well, I have had talks with all of their men as far as that goes.
Q. Have you told all the talk you had with them?
A. Have I told all I had with them?
Q. Yes, practically all the talk you had with them?
A. I think so.
Q. Is that a big spring?
A. Yes.
Q. Does the water run away from it quite a ways?
A. Quite a little creek runs from it. There is a creek running there, but it is often muddy. You can't do anything with it so far as watering stock is concerned.
Q. Which way does the creek run?
A. It runs west.
Q. It runs across section 25, does it?
A. No sir.
Q. Across the corner of section 25?
493 A. No, sir.
Q. What do you say about that?
A. I say, no, sir.
Q. You say it does not?
A. No, sir, not the spring I mean, does not.
Q. Is there any spring there on section 25?

A. I don't know.

Q. When was it you say you had this talk with Chester Starr and these men about wanting to have the feed on these sections until fall. When was that? What time in the summer that you claim you had that conversation?

A. That was along in July.

Q. What time in July?

A. About the second of July.

Q. That was the first talk you ever had with them about it, was it?

A. I have talked with them different times.

Q. Was that the first talk?

—. ——.

A. That is what I am asking, whether you ever had any talk before or ever talked afterwards, this time when you said you had not got a line yet, was that the first talk you had with them?

A. That was I believe, when they stated they had not had a lease yet; yes, that is the first talk I had with them.

Q. Whom was that talk with?

A. Chester Starr.

Q. Who was present?

A. I could not say.

Q. You say that was about the 2nd of July?

A. No, sir, I don't know what time that was.

Q. What say?

A. I could not tell you what time that was.

494 Q. Was that later than the 2nd of July or earlier?

A. It might have been later or earlier I could not say.

Q. Don't you know, whether it was later or earlier?

A. No, sir.

Q. Do you claim to have had any talk with Goodwin or Parkey about this matter?

A. Oh, I have, but I don't remember what it was.

Q. You don't remember anything about what it was.

A. No, sir.

Q. You don't remember anything about what talk you had with the two Beards?

A. No, sir, not exactly. I did have a little talk about a little trouble about sheep with Trace Beard one day.

Q. What say?

A. I had a little talk with Trace Beard, one evening over some sheep.

Q. Before or after you had the talk with Chester Starr?

A. That was after I had the talk.

Q. Afterwards?

A. I think it was. I would not say for sure.

Q. You say you had seen Parkey about here; he is a witness for the Government?

A. Yes, sir.

Q. Chester Starr was a witness for the Government too, was he not?

A. I don't know; I couldn't tell you anything about it.
Q. Subpœnaed as a witness?

Mr. HENEY: Yes, they are subpœnaed, but they are not witnesses for the Government, and won't be; you can have them if you want them.

Q. Chester Starr was subpœnaed here as a witness for the government, was he?
A. Well, I could not tell you anything about it.
495 Q. You don't know about that?
A. No, sir.
Q. You say you had a talk with Chester Starr about the range there in 1902?
A. Yes, sir.
Q. And you and he agreed about the lines, did you?
A. We did, after a second talk.
Q. Where were the lines run?
A. They were to run from one prong of Wolf Creek over to another branch that ran down by the Pollard place.
Q. By whose place?
A. The Pollard place; that dry run is there on this side of the mountain, the south side of the mountain.
Q. That would give them the range of the same section Morrow & Keenan had rented, or Morrow & Keenan and some of them.
A. Yes, sir.
Q. And you agreed back and forth on a line?
A. Well we did, after considerable talk.
Q. How long have you been here as a witness?
A. About two weeks, I think.
Q. You have been kept up with the other witness-, have you, during the daytime?
A. Yes, sir.
Q. Have a kind of bull-pen up here, don't you?
A. I believe that is what you might call it.
Q. What?
A. You might call it that.
Q. And then during the evening and nights they kind of herd you down at the Olympic Saloon, don't they?
A. No, I was down in the Streets of Cairo the last few nights.
Q. Oh, you stay on the Streets of Cario most of the time?
496 A. A few nights anyway.
Q. What say?
A. A few nights I have.
Q. They herd you down there?
A. Yes.
Q. And have you been down there about the Olympic saloon any?
A. I don't know where that is.
Q. Isn't there a saloon down here where they keep the witnesses together or where you get together by some kind of an arrangement?
A. No, sir, I never had any arrangements to get together there.

Redirect examination.

Q. Just to see how much of this is Mr. Bennett's examination and how much of it is fact or fiction, I want to ask you a few questions about this herding pen up here. Where is this hogpen or herding-pen or whatever you call it?

A. I haven't been into it yet that I know of.

Q. You didn't see any?

A. No sir.

Q. The fact is that the witnesses who are subpœnaed here have chairs provided for them to sit in a large hall, just the same as this hall here, on the floor above, which is on the same floor as my office; chairs and benches supplied for them to sit and wait in attendance on being called here. Is that it?

A. Yes, sir.

Q. That is what counsel denounces as the "pen." Now, have you been herded anywhere? Has anybody looked after you at night?

A. Not that I know of.

Q. Aren't you dismissed up there when court adjourns?

A. Yes.

Q. And told to go where you please—always have been.

A. Yes.

Q. Prior to this 1903 arrangement, did Starr ever tell you
497 to keep the sheep off the even sections?

A. Yes, sir.

Q. He did tell you that?

Objected to as leading and incompetent.

Q. What did he say about that?

A. He said all the water on the even sections he claimed that he wanted them respected.

Q. Did he tell you how they got it?

Same objection, and not binding on any of the defendants.

Q. I mean, did he tell you what their claims was as to what their title was based on?

Mr. BENNETT: We make the same objection to this and we save an exception.

A. Well, they had it taken up, is my understanding of it.

Q. What was it you heard in 1901 about renting road sections, Morrow & Keenan renting them; what time in 1901 did you hear Morrow & Keenan were going to rent road sections?

A. Well, Keenan came to me at the shearing plant and said they were going to have good——

Objected to as incompetent.

Objection sustained; Question withdrawn.

Q. At the time Morrow & Keenan sheared their sheep at Williamson & Gesner's plant, that was in 1901?

A. Yes, sir, to my best recollection.

Q. During that year you had not been herding any sheep, and none of the sheep of Morrow & Keenan had been herded in 15-19?

A. Only just long enough to get sheared, was as long as I stayed there.

Q. Where is this Sam Smith place and whom did it belong to?

A. It belonged to Sam Smith—C. Sam Smith.

Q. Did Morrow & Keenan have it rented in 1901?

498 A. No, sir.

Q. You don't know what arrangements they were there under?

A. In 1902 they were there, I think.

Q. On Sam Smith's place?

A. Yes.

Q. I understood you to say that in 1901 when you were herding.

A. Oh, no, I was packing when we was at Sam Smith's and had supplies there. That is what Mr. Bennett was asking me, where I had my headquarters.

Q. You made Sam Smith's place your headquarters when you were packing?

A. Yes, sir.

Q. Were the sheep being herded over at Sam Smith's place any?

A. Oh, no, they were herding on these sections in 1902 that Morrow and Keenan had leased.

Q. Where is that?

A. On these sections Morrow & Keenan had leased in 1902 in Horse Heaven, 15-19.

Q. Where was this line you say that you and Starr agreed on; about where would that go? Can you tell us by that map? That is 15-19 in the center. What sections did it leave you folks?

A. It ran from about in here (16) down to about there, and took over the mountains almost due north from 16.

Q. From 16 it ran down through sec. 23 on the west side, was it, west of the middle of sec. 23?

A. Well, it kind of takes in a creek; takes in this, where there was a little dry run half or a quarter of a mile off.

Q. That red line is little Horse Heaven?

A. Well, this probably is the place then, about here.

Q. So that it gave you 25 and 23, 15, 13 and 11, did it?

A. Yes, sir, that is right.

Q. And gave you the even sections that were over on that side?

499 A. Yes, sir.

Q. Now, as to 25, how do you get on to 25 to graze on it; supposing you were up in 22, how did you get from 22 into 25 to graze 25?

A. That is 24, isn't it?

Q. I mean 24; how did you get from 24 to 25?

A. We always came right across the creek.

Q. Wasn't there a high bluff here somewhere of rimrock?

A. I should judge it to be in there where that high bluff was. It

would leave about 106 acres on the other side of that bluff the way I always had it figured out.

Q. As to this part of 25 could you get straight down across it with the sheep?

A. There was a fence in there on 36.

Q. But I mean to get into this part of 25, the south half of it, could you go straight down from 24 without going around here?

A. Yes, sir, I always thought so.

Q. Were you not working for them in 1904?

A. No sir.

Q. Now, up to the time you left, was there any dispute about any cattlemen ranging in there?

A. No, sir.

Q. Did you hear any threats against you for ranging in there at that time?

A. None that I ever heard.

Recross examination.

Q. Here is a plot of sec. 15-19. Whereabouts did the line commence that you made, on the north of the section?

A. On the north of the township.

Q. On the north of the township, I mean.

500 A. Right here is the line coming through.

Q. Did the line you agreed on extend clear up to the north of the township?

A. It extended on over.

Q. Now, fix the place where it commenced on the north line of that township, the line you agreed on?

A. I cannot see the creek here; it ought to be mapped out.

Q. Here are the numbers of the section, you know how the section numbers lie there, don't you?

A. Yes, I know about how they lie.

Q. Here is sec. 3; 1, 2, 3, 4, and so on.

A. Well, it went down in here to—that is 4, isn't it?

Q. Yes, that is 4 and they turn back, 7, 8, etc.

A. The creek runs down in here some place.

Q. What creek?

A. I could not tell you the name of the creek; there was several different names to it.

Q. Then the line strikes the north line of the township about where, that agreed on, that is on what section?

A. Sec. 9. I tried to make it that way. That is what I tried to do.

Q. Nine doesn't touch the north boundary of the township?

A. Here it is (pointing to the map).

Q. But you went further north with your line, didn't you?

A. Yes, sir, we had nothing in there.

Q. Did your line extend up that far?

A. Couldn't make it that far.

Q. You did not.

A. No, sir.

Q. That is what I am trying to get at. I understood from you that it went up still further.

501 A. It goes up to 9 here.

Q. Whereabouts on Section 9 did it come up? As far as the north line of Section 9?

A. Well, on the even section below it, 4, is the one I tried to get. I tried to get part of 4, if I could, but I never got it.

Q. Did your line take part of 4 as you agreed on?

A. Yes.

Q. Then your line did run across to the township line which you had agreed upon.

A. Yes, sir.

Q. Now, whereabout on section 4, did it strike the township line.

A. The line that I had agreed on ran at the creek.

Q. Where was the creek; half way across?

A. I could not tell you.

Q. Mark as near as you can on there where you think it crosses the township line. We haven't got the creek on here, and therefore can't mark it by that, but we will remember that you say it was at the creek.

A. Well, I couldn't say for sure, whether it took in a part of 9 or all of 9, but that is what we agreed on.

Q. You agreed on the creek?

A. Yes, sir, on the creek.

Q. And you think it ran somewhere along about the line between 9 and 10 and four and 3?

A. I could not say for sure, because I never saw a map of the country there. I always thought though that the creek was over in here.

Q. Over farther between 9 and 8 and 4 and 5?

A. I thought the creek was in there. There are three or four creeks in here and they all head together and they are not

502 over half or three quarters of a mile apart or two miles.

Q. You had the privilege, all of you, of ranging that land? I don't understand, I thought you said you had them together.

A. We were supposed to get the privilege of ranging there, yes.

Q. Both?

A. No, sir.

Q. Oh, *you* were supposed to.

A. Yes.

Q. I wish you would make the township line here, as nearly as you can, where the line would commence. Make a cross mark there.

A. Well, I believe it commenced right there.

Q. Now, mark the line on there. Along down as you think it ran through the township; just mark it where you think it would run clear down through.

Mr. Henry: He has made the line run through striking about through the middle from the northwest corner of 4, and going a little bit west of the middle, striking the south line of 4, about the middle, and still running diagonally across 9, until it strike- the

south line of 9 about one quarter of the way west of the line between 9 and 10.

Q. Then to the corner of 9 and 10?
A. Yes, to the corner (Marking).

Mr. Heney:

Q. Then to the corner of 9 and 10 and then down along the line between 15 and 16.

Q. To the southeast corner of section 16. Now, mark it on from there down.

Mr. Heney: Then diagonally across 22.

A. To Horse Heaven wherever that is. (Marking.)

Mr. Heney: Striking the south line of 22 a little east of the middle of the south line, and continuing in the same direction to about the middle of 27, and then turning west to Horse Heaven Creek.

Excused.

503 Thereafter, William Elliott being called on the witness stand and having testified that he was running cattle in township 15-19 adjoining the range of the defendants, and had been since, prior to 1902 was asked the following question, "Did you have any talk with Dr. Gesner in 1902, in regard to that range?" A. Why I don't know; I guess I did. Q. About when? A. Well, sir, I couldn't tell you. Of course I was well acquainted with the Doctor, we were both of us using the same range a good deal of the time. I couldn't tell just at what time I would think it was along about 1903, it may have been 1904. 1904, I guess it was. Q. I misunderstood you then, off the stand. I thought this conversation was in 1902, the one I refer to at the time those timber filings were being made up in the Horse Heaven Country." A. Well I don't recollect whether it was along about that time or not, just for certain, I couldn't say; I have gotten nothing to refer to really, because I and the Doctor talked quite frequently about our business and one thing and another." Whereupon the following question was asked, "what was the talk between you and the Doctor, what talk did you have with Dr. Gesner in regard to the leasing of these road sections in 15-19, if any talk at that time occurred?" To which the defendants and each of them objected as incompetent and immaterial; whereupon the offer was limited to the defendant Gesner and the objection as to him overruled and the defendant Gesner excepted to the ruling of the Court, whereupon the witness answered, "Well, at one time the doctor spoke to me about some section the parties had leased there." Whereupon the following questions and answers were permitted to be given by said witness over the same objection and exception of said defendant Gesner. Q. "What parties." A. I believe it was Morrow and Keenan. Q. What did he say about it? A. Well, he said their time was about expired, and
504 he thought we ought to stand in and help lease it to keep out other stock; I told him I had all the road lands leased that my business would pay, and I was not able; I thought

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the others ought to help do that, and that I had my share of it leased, I thought as much as I was able to lease something to that effect." Whereupon the following question was asked, "What, if anything did he say to you with reference to Morrow & Keenan grazing in there? Whereupon the defendants objected as incompetent and immaterial, but the objection was overruled and said defendant excepted to the ruling and the witness answered: "He just spoke about—he said other stock, sheep and everything was running in there, and we ought to have that leased because it was right there on the range, bordering on the range and ought to have it leased, so as to have it ourselves; that we had the better right to it, being as it bordered right on the range, something to that effect." Q. "Did he say anything about Morrow & Keenan crowding him?" A. "Yes sir," I think he spoke about them crowding down."

Upon the direct examination of the witness he had already testified among other things, that there was no trouble between the cattle men and the sheep men in 1902 that he ever heard of.

Upon the cross examination it was developed from the witness that there had been sheep killed prior to that time through the country generally commencing in the year, 1900, and that the defendant Gesner had a few killed in 1902. Whereupon on redirect examination the witness was asked the following question, "The last killing was about 600 head of sheep belonging to Morrow & Keenan that were killed right in there on Section 35 in 1904, was it not, right in about the northeast corner of section 35? A. Yes sir, I think it was right in there some place. Q. That was in 1904?

A. Yes, that was 1904 when the sheep was killed. Q. And
505 right after that Morrow & Keenan got out of business there, didn't they, of running sheep up there? A. Well, they taken their sheep out shortly afterwards. Q. Wasn't it right after that killing that Gesner wanted you to join with them in leasing those road sections that Morrow & Keenan had given up? Is not that what your talk applied to? A. Well, I really think it was before that Doc spoke to me about it, I would not say positively just the time."

The following is all of the evidence of the aforesaid witness William Elliott introduced at the trial.

506 WILLIAM F. ELLIOTT, sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. HENEY:

Q. You live in Crook County?
A. Yes, sir.
Q. How long have you lived there?
A. Since I first went there, about 26 years this fall.
Q. What business are you in?
A. I am engaged now in the stock business.
Q. What kind of stock?

A. Cattle business.
Q. Were you engaged in that business in 1902.
A. Yes, sir.
Q. Whereabouts was your range from 15-19?
A. I guess it is east and south.
Q. Do you know what township and range it is in?
A. Township 15—I believe it was 15-17.
Q. Were any of your cattle running in 15-19 in 1902?
A. Yes, sir, they would run there.
Q. Many of them?
A. Why, yes, sometimes there would be quite a lot run in there.
Q. Did you leave them in there? In that Horse Heaven country when they would run in there?
A. Why, we would—of course, they would come and we would drive them back on the range, but they would run there quite frequently; most all the time some of them was there.
Q. Was there any trouble between you and any other cattlemen and the sheepmen that you know of in 1902, about the
507 range in 15-19?
A. I never knowed of any. I never had any trouble with anybody.
Q. Did you have any talk with Dr. Gesner in 1902 in regard to that range?
A. Why, I don't know; I guess I did.
Q. About when?
A. Well, sir, I couldn't tell you. Of course, I was well acquainted with the doctor, we were both of us using the same range a good deal of the time. I couldn't tell just at what time.
Q. Can you fix it by any event that was taking place at the time?
A. I would think it was along about 1903; it may have been 1904. 1904, I guess it was.
Q. I misunderstood you then off the stand; I thought this conversation was in 1902, the one I refer to at the time those timber filings were being made up in the Horse Heaven country. A. Well, I don't recollect whether it was along about that time or not, just for certain, I couldn't say; I have got nothing to refer to really, because I and the doctor talked quite frequently about our business and one thing and another.

Mr. BENNETT: We object to this as incompetent and immaterial as to each of the defendants.
Mr. HENEY: We will offer it as against the defendant Gesner only.
Objection overruled; defendant Gesner excepts.

A. What was the question?
Q. What talk did you have with Dr. Gesner in regard to the leasing of these road sections in 15-19, if any talk at that time occurred?
508 A. Well, at one time the doctor spoke to me about some sections the parties had leased there.
Q. What parties?

A. I believe it was Morrow & Keenan.

Q. What did he say about it?

A. Well, he said their time was about expired, and he thought we ought to stand in and help lease it to keep out other stock; and I told him I had all the road lands leased that my business would pay, and I was not able; I thought the others ought to help do that, and that I had my share of it leased, I thought as much as I was able to lease, something to that effect.

Q. What, if anything, did he say to you with reference to Morrow & Keenan grazing in there?

Mr. BENNETT: We make the same objection to that.

The COURT: That is still conversation with Gesner?

Mr. HENEY: Yes, Your Honor, and this is offered against Dr. Gesner only.

Objection overruled; defendant excepts.

A. He just spoke about—he said other stock, sheep and everything was running in there, and we ought to have that lease because it was right there on the range, bordering on the range, and ought to have it leased, so as to have it ourselves; that we had the better right to it, being as it bordered right on the range, something to that effect.

Q. Did he say anything about Morrow & Keenan crowding him?

Objected to as leading, putting words in the mouth of the witness.

Objection overruled; defendants except.

A. Yes, sir, I think he spoke about them crowding down.

509 Q. Something to that effect, crowding his land?

A. Yes, he spoke something about them crowding; said they crowded down, or something to that effect.

Cross-examination.

By Mr. BENNETT:

Q. When was that, Mr. Elliott?

A. Well, I would not be positive as to the time, but it was about a couple of years ago, something like that.

Q. Didn't you say it was about the time Morrow & Keenan's lease was expiring?

A. Yes, that was my understanding, their lease would expire at a certain time.

Q. That was last year, wasn't it?

A. Well, it might have been a year ago last spring.

Q. You think it was, don't you?

A. Well now, I wouldn't actually be positive.

Q. Isn't your best memory as to when it was, a year ago last spring?

A. Well, it possibly might have been, yes.

Q. Well, what do you say as to whether it is your best memory that it was at that time?

A. Well, I kind of have an idea that that would be about the time; still, I would not say positively.

Q. It was about the time Morrow & Keenan's lease was expiring anyway, was it?

A. Yes sir.

Q. And still you claim it might have been in 1901 or 1902?

A. No, it was not as far back as 1901. It was in 1903 or 1904. I would not say positively, because I could not conscientiously
510 say just exactly.

Q. But you know it was either 1903 or 1904?

A. Yes.

Q. Sure of that?

A. Yes, sir.

Q. Who was present at that conversation?

A. No one but I and the Doctor, as well as I recollect now.

Q. Is that all the talk you ever had with Dr. Gesner about Morrow & Keenan and their sheep?

A. I think it was.

Q. All the talk you ever had with him at any time?

A. I don't recollect having any talk with him any more except that time.

Q. About them or about their sheep?

A. Not that I recollect of. I might sometime or other, but I don't recollect.

Q. If you had you don't recollect it?

A. No. Of course, I was well acquainted with him and met him quite often, but I don't recollect of any.

Q. And Dr. Gesner, you say, wanted you, when their lease expired, to lease, or suggested to you that you could lease it.

A. Yes, he said he thought I ought to; that it was joining the range, and I thought I ought to help lease it. He just spoke to me, and said he thought I ought to, or something to that effect, and I believe I suggested that others ought to. That I had all I was able to lease, that my business would not pay me to lease any more land.

Q. You suggested that who ought to?

A. That other parties had a better right to lease it, because there was other parties that had no land leased, and I had leased
511 all my business would stand.

Q. Did you suggest what other parties ought to lease it?

A. I don't know just now whether I did or not; I might have done it though; I believe I did, since I come to think about it.

Q. Who did you suggest ought to lease it?

A. I believe I said that Boyd Adams was running quite a lot of stock there, and I thought something to that effect, that maybe he would lease it, or something.

Q. You never had any talk with Williamson about the matter at all? About Morrow & Keenan's sheep, or Morrow & Keenan?

A. I don't recollect that I had.

Q. Where was your place from Williamson, Wakefield & Gesner's place at that time?

A. Why, it is a little south of east.

Q. How far?

A. Oh, I should think about 8 miles.

Q. On the same creek?

A. Oh, it is more than that from their plant, too. It would be about 12 or 14 miles.

Q. On the same stream?

A. Yes, it is on a little stream that is called Lost Creek, that runs into Crooked River. It runs out of the south side of Lookout Mountain.

Q. You say you don't remember of there being any trouble at that time. Wasn't that the year that some of Mr. Gesner's sheep were killed?

A. Well, I heard there was a few of them killed.

Q. Was it that year?

A. No, I think it was after that me and Mr. Gesner was talking.

Q. You don't think that was in 1902?

512 A. It seems to me it was 1903 or 1904, but I wouldn't be positive, that we was talking.

Q. Did they have what they called dead lines in 1902?

A. Well, I don't know as we ever had any dead lines.

Q. You never knew of there having any dead lines?

A. No. I and Dr. Gesner talked, and I don't know but me and Mr. Williamson did, about Lost Creek, we made it the line there, and just within ourselves, so far as I know. I don't know that they had any contract with anybody else. They always observed the line so far as ever I knowed.

Q. Without any reference to that particlar locality where you lived, Mr. Elliott, but in that country generally, from Klamath Lake up to Prineville, haven't there been trouble between the sheep and cattle men prior to 1902?

A. Yes, I think so.

Q. And sheep had been killed through the country there?

A. Yes, that is the report.

Q. When did that commence? What year do you remember; about 1900?

A. Yes, 1901, somewhere along there.

Q. And it continued right along more or less generally in different parts of the country, breaking out in different parts of the country up until the time that the last legislature passed a law providing for a reward for anybody who did anything of that kind, and then it kind of quieted down. It quieted down since then, didn't it?

A. Well, I haven't heard of anything right lately.

Q. That was a year ago last winter that the legislature passed that law?

A. I think so as well as I can recollect.

513 Redirect examination:

Q. The last killing was about 600 head of sheep belonging to Morrow & Keenan that were killed right in there on section 35 in 1904, was it not, right in about the northeast corner of section 35?

A. Yes, sir, I think it was right in there some place.

Q. That was in 1904?

A. Yes, that was 1904 when the sheep was killed.

Q. And right after that Morrow & Keenan got out of business there didn't they, of running sheep there?

A. Well, they taken their sheep out shortly afterwards.

Q. Wasn't it right after that killing that Gesner wanted you to join with them in leasing those road sections that Morrow & Keenan had given up? Is not that what your talk applied to?

A. Well, I really think it was before that, that Doc spoke to me about it. I would not say positively just the time.

Q. Did you ever hear of any cattlemen being unfriendly terms with Williamson & Gesner in there?

A. No, I didn't; I never heard anything about it.

Q. You never heard any complaints among the cattlemen against Williamson & Gesner at any time?

A. I hadn't up to that time, no.

Q. How did they stand with the cattlemen up there as compared with other sheepmen?

A. Well, so far as I knowed, I thought they was on good terms with them.

Q. Did you hear any talk up there in 1902 to the effect that title to the road lands was not recognized by the cattlemen?

A. That the road lands was not recognized by the cattlemen?

Q. Yes, that they would not recognize title to the road com-
514 pany lands?

A. Why, no, I don't recollect anything about it.

Q. So far as you know, road land titles were recognized to the same extent as any other titles, were they?

Objected to as leading.

Q. What do you know about it, as to the recognition of road land titles?

A. I suppose a man had road lands leased, he had the same protection as if he had a deed to it.

Q. Did they recognize a deed to them the same as a deed or a patent of the United States to any other person?

Objected to as leading.

A. Well, if a man had it leased he had control of it.

Q. Did you ever hear any talk among the cattlemen to the effect that a road title was a fraudulent title and they would not recognize it at all?

A. Well, of course, it is the general opinion of the country—used to be, that it was a fraud so far as that is concerned.

Q. All the cattlemen and sheepmen up there leased from the road company, don't they?

Objected to as leading.

A. Yes.

Q. And fence it and use it?

A. Yes sir.

Q. And recognize it?

Objected to as leading.

A. Yes.

The COURT: Road titles are new to me; we do not have them in our state.

Mr. HENEY: There were some grants made to road com-
515 panies for building wagon roads; similar to railroad grants. Some of the roads are not very good roads.

The COURT: And it created hostility between the settlers and owners of the road land grant?

Mr. WILSON: The title has not passed beyond the grantee's hands except to a trustee.

Mr. HENEY: It is held in one body, and they are not selling it.

Q. There is no squatting on it, is there?

A. No, sir, I guess not; if they did, it wouldn't do any good; they learned that a long time ago, that it was no use to fool them.

Q. A long time prior to 1902?

A. Yes sir.

Recross examination:

Q. Still, people are a whole lot dissatisfied about that, aren't they, in that country?

A. Well, it appears to give the country a black eye all the time of course.

Q. And people up there don't take very kindly to that road land grant, do they?

A. No, of course not.

Q. They think it is wrong?

A. Well, they think the people was swindled; that is the general opinion so far as ever I knowed.

Q. And don't you know, Mr. Elliott, that when those lands are unfenced, the people up there don't look at those lands the same as they do at the lands of a homestead settler? They do not consider them as sacred, do they, when they are unfenced?

A. No.

Q. You say that so far as you know the cattle men have
516 been on good terms with Williamson and Gesner?

A. So far as I knowed, they was, yes.

Q. That is, they are considered fair men with their sheep?

A. Yes, sir; I always considered them so.

Q. They are considered men who respect the rights of cattlemen pretty well?

A. Always did so far as I know.

Q. And kept their sheep away from little homes and settlements?

A. Yes, so far as I know. After we had an understanding about the lines, if they ever encroached any, I never knowed anything about it.

Q. But you heard about their having some sheep killed just the same, didn't you?

A. I heard they had a few killed yes.

Q. You heard they were killed in the night time?

A. I heard they had a few killed, yes.

Q. You heard they were killed in the night time?

A. Well, I don't recollect hearing when they was killed, whether night or daytime?

Q. Don't you know about these Morrow & Keenan sheep, that it was claimed at the time that they had got across the line agreed upon or fixed between the cattlemen and sheepmen?

Mr. HENEY: I object to that as incompetent. They can prove the facts if they are facts. I would like to go into the facts but I don't want to go into hearsay.

Mr. BENNETT: The whole business is hearsay.

Q. You don't claim to know anything about the killing of these sheep from your personal knowledge?

A. No, but I was on the ground afterwards riding, and seen the place, but that is all. I was riding after cattle quite a little afterwards.

517 Mr. HENEY: Which sheep are you talking about now?

A. Morrow & Keenan's.

(Mr. BENNETT:)

Q. That is what Mr. Heney asked you about.

A. That is the one you asked me about.

Q. And the ones Mr. Heney asked you about in the first place?

A. Yes.

Q. Now, the place these sheep were killed was across the line on one of the sections the cattlemen claim was on their side of the line, weren't they?

A. Well, it was on the east side of Horse Heaven.

Q. And Horse Heaven creek was claimed to be the line, wasn't it, between what the cattlemen had and what the sheepmen had?

A. Yes. Of course, Williamson and Gesner owned land on the east side, but Horse Heaven made the line after you got down to their ranch; but they had land on both sides of Horse Heaven after you got further up next the timber.

Q. That is, Williamson and Gesner had?

A. Yes.

Q. They had some land down there, hadn't they?

A. Yes.

Q. But they were *now* permitted to use it, were they?

A. Below?

Q. On the east side of Horse Heaven creek?

A. No, I think they always left that for the cattlemen; that was my understanding. At least they never used that.

Q. And these sheep Morrow & Keenan had got across on this side of Horse Heaven creek when they were killed?

A. Yes, sir, they was on the east side.

Q. There had been a good deal of dissatisfaction before that about Morrow & Keenan's sheep getting across on that side of the creek, had there not?

518 A. Over on that side?

Q. Yes, a good deal of talk about their violating the rule and running sheep on that side of the creek?

A. Well, they had been crossing some, I guess, more or less.

Q. There had been a good deal of dissatisfaction about it, hadn't there, a good deal of talk?

A. I think there had been some dissatisfaction —.

—. — of Morrow & Keenan were killed, the defendants took their sheep all inside their pastures, didn't they, that is, Williamson & Gesner?

A. Well, I don't know whether they taken them all in or not; I could not say whether they taken them all in or not.

Q. You know they took them in generally?

A. I know they took some in when the range got short, they would take their sheep into the pasture in the fall.

Q. Don't you know that immediately after this killing of sheep and before the usual season, they took their sheep in there, immediately after Morrow & Keenan's sheep were killed, that they took their sheep inside their pastures and kept them there all the time?

A. I know they taken some and they might have taken them all; I wouldn't say for sure.

Q. Inside of their fenced lands?

A. Yes, in their pasture. I don't know that they taken them all, but they might have taken them all; I wouldn't say for sure about that.

Redirect examination:

Q. What time did they take them in?

A. In the fall.

Q. They always take them in at that time, don't they?

A. Yes, that is, after the range would get short; that is,
519 they would commence to taken them in.

Q. Whom did you hear express any dissatisfaction in 1902 with Morrow & Keenan having crossed the line; as early as 1902. Was the*ir* any dissatisfaction then?

A. In 1902?

Q. Yes.

A. I couldn't say in 1902; no, I don't recollect as there was any at that time. I wouldn't say that there was.

Q. Now at this time, in 1904, just before this killing, what cattlemen did you hear express an opinion, or dissatisfaction?

A. Well, I couldn't really speak of just who I heard say anything about it. Of course, as the sheep would crowd down, it would force the stock all down in a bunch and would make it ill-convenient for all, so far as that is concerned.

Q. At the time that you had this talk with Gesner, you say you suggested Boyd Adams?

A. Yes, sir, I told him the Boyd had a good many cattle in there, and that——

Q. Boyd was then running cattle in there at the time of the talk, was he?

A. Yes, I think he was.

Q. Boyd Adams sold out to J. H. Gray in the fall of 1902, didn't he?

A. Well, he might have.

Q. And it was prior to that sale you had the talk?

A. Yes, it was. I think I mentioned Boyd to him, that perhaps he would lease it, or something like that; that I thought Boyd would lease it, but as I told you before, I wouldn't be positive right to the time me and him had the talk.

Q. That section 35 is the only section that Williamson &
520 Gesner had that crossed Horse Heaven creek, isn't it?

A. Yes.

Q. Was that section fenced?

A. I wouldn't say that it was the only one they had. I know they had some in that township over there.

Q. Was that section fenced?

A. No, sir.

Q. Section 36 was fenced, wasn't it the school land section?

A. Yes, I think so.

Q. And there was very little land between Horse Heaven creek and section 36?

—. Of course, I don't know just where the corners are, I am not very well posted on the lines right there, because it is out of my latitude and stock range, and I don't know just how the lines run.

Q. In the spring of the year that the sheep were killed in 35, as a matter of fact, do you know as to whether Williamson & Gesner had not leased their sheep on 35 and eaten it all off before Morrow & Keenan came along?

A. Well, I couldn't say for sure whether they had or not.

Q. And was not the story you heard, that those men had driven their sheep from over here, away on the west side of Horse Heaven creek—that the fellows who killed them had driven them from way on the west side over on the east side and partly into 36 and the killing over there?

A. Yes, I heard that; I heard several reports, so far as that is concerned; a good many reports about it.

Mr. BENNETT: We move to strike that out, Your Honor, as incompetent.

Mr. HENEY: As hearsay?

Mr. BENNETT: On the ground that it is incompetent.

Mr. HENEY: Well, if it is on the ground of hearsay, I will
521 — it go out.

Mr. HENEY: Then it will go out.

Q. Do the cattlemen up there look *up* upon a timber claim, where a big bunch of timber claims have been filed, as sacred, so that they won't graze the grass?

A. No, the cattle runs at large down there.

(Cross:)

Q. What say?

A. The cattle runs wherever they please, so far as I know.

Q. Don't pay any more attention to the fact that a timber claim has been filed than they do that it is a road section that is unfenced.

A. Not that I know of, so sir; I never knowed of anything of that kind.

Recross examination.

Q. You mean by that that the cattlemen let their cattle go where they please?

A. Pretty much. Lots of times we will drive their cattle back.

Q. You don't mean to say that the cattlemen don't respect a man's timber claim?

A. If it isn't fenced, I don't see how they would respect it. At least, I know nothing of it, if they do. Cattle isn't herded at all in that country.

Q. Isn't it recognized that a man has a right up there to run sheep or any kind of stock he has on his own deeded land wherever it is?

—. ——.

Q. Whichever side of the dead line it is on?

A. I suppose so, yes.

Q. And on his timber claim and homestead claim, too, isn't it?

A. Yes.

Q. Isn't it a fact that that year after the killing of Morrow & Keenan's sheep, Williamson and Gesner put their sheep into
522 the pasture than they were accustomed to do; that is, earlier in the fall than the usual time?

Mr. HENEY: I object to any further hearsay. If he knows let him state.

A. Well, I said I don't know whether they taken them all in or not, I wouldn't say positive whether they was all taken in or not. They taken some sheep in, but I don't know whether the-taken them all in or not.

Q. You know they took some in. Wasn't that earlier than they usually put their sheep in the pasture, a good deal earlier?

A. Well, I couldn't say for sure, whether it was earlier or not; it might have been a little earlier. They always taken them in the fall, but I wouldn't say it was earlier or not.

Q. What year was it Morrow & Keenan's sheep were killed?

A. I don't know the dates; I couldn't say now just what dates it was.

Q. You know, don't you, that Morrow & Keenan had been running their sheep over on the east side a good deal, on the east side of Horse Heaven Creek?

A. Up in the timber, I think so, yes.

Q. And that is what the dissatisfaction was about, about their running on the east side of the creek?

A. Well, of course, I suppose they ran on both sides of the creek as well as I recollect. I think Morrow & Keenan did. I ain't sure.

Q. That is what the dissatisfaction was about, wasn't it, because they ran their sheep on that side of the creek?

A. I couldn't say whether it was for sure or not. As far as that is

concerned, I lived on the Ochico, 25 miles from there. That
523 is, where I lived myself. I have got a ranch that is 14 or 15 miles I think from Gesner & Williamson's plant, east, a little south of east perhaps.

Q. So that you are not much over in that country?

A. Well, of course, I am there very frequently, but while I live on the other ranch below, I am not there as much as a man that lives up in that country all the time.

A. And you have been over in that country, however, and saw where those sheep were killed?

A. I was there in the fall, yes, sir.

Q. After they had been killed?

A. Yes.

Q. And that is all you know of your own knowledge is what you saw there?

A. That is all I know, yes.

Q. And what you saw was that the sheep were killed on the east side of the creek?

A. Yes, sir, there was some; all I seen was on the east side.

Q. If they were driven from the other side, you don't know anything about it?

A. If they was, I don't know it, no.

Q. But you have heard all kinds of rumors about it?

A. Well, I have heard considerably yes, just as a person will about anything like that. Of course, you hear a good deal.

(Excused.)

524 WILLIAM ELLIOTT, sworn on part of the government, testified.

Direct examination.

By Mr. HENEY:

Q. I call your attention, Mr. Elliott, to a conversation you had with Dr. Gesner in Prineville in which there was some talk about the cattlemen helping him to lease some sections in 15-19.

A. Yes.

Q. Can you state about when that conversation took place?

A. Well, after reflecting back over it, I think it was in 1902.

Q. Now, then, in that conversation, was that during the time these filings were going on in 15-19, about that time?

A. Well, it was along about there, yes sir.

Q. Now, in that conversation, did Dr. Gesner say to you, in substance, that the reason he was having parties file up there was because Morrow & Keenan were crowding him on his range?

Mr. BENNETT: That is objected to as not being a proper impeaching question, and having been already gone into, in the direct case when Mr. Elliott was on the stand before, and no proper foundation having been laid for an impeaching question, time, place, and persons present not having been called to the attention of the witness.

Objection overruled.

Mr. BENNETT: We take an exception as to each of the defendants.

A. Please repeat that question.
Q. (The question was repeated.)
A. Well, I don't recollect that he said about filing, that Morrow & Keenan was crowding him, but he spoke—do you mean of the real land?
525 Q. Yes.
A. He said that, speaking about—I don't know as he spoke of Morrow & Keenan straight out at them, but there was other sheep——

Mr. BENNETT: We make the same objection, Your Honor.

Q. Can you say yes or no to that question?
A. Well, I would say no.

Mr. BENNETT: Now, we move that the answer he has already made be stricken out in relation to what did take place, as not proper impeachment. We move to strike out the answer of the witness as to what was said, as not being——
The COURT: Yes, let that go out.

Q. Now, in that conversation did Dr. Gesner say that the time was coming when every man would have to own his own range to run his stock on, and he wished to so arrange his business that he could run his stock all on his own land, as there would be contention in the future over the range. Did he tell you that in substance?

Mr. BENNETT: We make the same objection.
Objection overruled.
Defendants except.

A. Why, yes, I think he did; he spoke about that in the future the land would be so taken up that men would have to look after the land to run their stock on, or something to that effect.

Mr. BENNETT: We move to strike out that answer as not responsive to the question, and not impeaching testimony.
The COURT: Do you want the answer "yes" to stand?
526 Mr. BENNETT: Well, taking his whole answer together; he went on and said something else.
The COURT: I take it that all ought to go out except the word, "yes."
The COURT: No, I don't think so. It does not necessarily follow that the whole should be stricken out if it is competent.
Defendants except.

Q. In that same conversation, did Mr. Gesner say to you, "You men who have stock ought to stand in with us and help lease the road sections up there; then all of us who have stock on the range in common can keep Morrow & Keenan's sheep and all other sheep out." Did he say that?

Same objection.
Objection overruled; defendants except.

A. Yes sir, he said to keep outside stock out; yes.

Mr. BENNETT: Now, I submit that the question is——

Q. Can you answer yes or no to this question: Did he in substance say, "You men who have stock ought to stand in with us and help lease the road sections up in there, and then all of us who have stock on the range in common can keep Morrow & Keenan's sheep and all other sheep out." Did he say that in substance?

A. Yes.

527 Cross-examination.

By Mr. BENNETT:

Q. Did he say anything about Morrow & Keenan's sheep in that conversation at all?

A. He said all sheep that were crowding out, yes.

Q. Did he mention Morrow & Keenan's sheep in any way?

A. Well, just to come right out, he spoke about all the sheep that crowded down there.

Q. Did he mention Morrow & Keenan's sheep? Did he mention Morrow & Keenan's name at all?

A. Well, I wouldn't say that he just mentioned them just out from anybody else. He said, of course others' sheep from all parts of the country would come in there, and crowd, and——

Q. And he thought it would be a good idea for you people who lived there and used the range to keep those sheep from the outside and all other stock from the outside away?

A. Yes.

Q. In that peaceable and lawful way?

A. Yes.

Q. But he did not mention Morrow & Keenan's name, didn't mention their name at all, he just made reference to the sheep there, everybody's sheep generally, without mentioning anybody's name?

A. Well, of course, right in there was a place that sheep from all parts of the country came in from the mountains.

Q. I am asking you whether he mentioned Morrow & Keenan's name, or whether he spoke of sheep generally, and outside stock generally.

A. Well, I take it that he meant all the stock.

Q. I am asking whether he mentioned Morrow & Keenan's name. You understand that, don't you, Mr. Elliott?

A. Yes.

528 Q. Now, did you mention Morrow & Keenan's name?

A. Well, just to mention them out from the rest, I wouldn't say that he did, but of course, there was——

Q. Did he mention their name at all, or did he just say sheep generally, and you referred that that covered theirs?

A. Well, I think it covered the whole business, yes.

Q. But he did not mention their name at all?

A. Well, of course, it applied to all of them.

Q. But he did not mention their name at all in what he said? That was your conclusion that it applied to all; but he did not mention their name at all, did he?

A. Well, I don't know but what maybe he did, yes. I would not come right out and say that he just mentioned their names right out from the rest, but there was others' sheep crowded there as well as theirs did.

Q. You won't say whether he mentioned their name or not? You don't know whether he mentioned their name or not?

A. Well, to come right out and say that he mentioned their name from the rest, I wouldn't say that — did.

Q. He did not mention anybody's name as a matter of fact, did he? He didn't mention any particular person's name?

A. Well, I wouldn't say as to that, certain, whether he did or not, just mentioned the same; but of course there was sheep from different parts was crowding, and they always had there, so far as that is concerned.

Q. You don't remember his mentioning any name; is that right?

A. Well, of course, I think there was names mentioned, but I don't know as he mentioned any certain ones, so far as that is concerned. There was different—that is, particular ones being worse than the others, I don't recall that he did.

529 Mr. BENNETT: I move to strike out all the testimony of this witness.

Redirect examination:

Q. Did he mention the names of any that were crowding in there? Didn't he tell you who was coming in there with sheep, or say anything about it?

A. Well, of course, there was sheep in there, as I said.

Q. That is not the question, Mr. Elliott. All we want to know is what Dr. Gesner said. Did Dr. Gesner in that talk say anything about Morrow & Keenan at all as being among those who were in there?

A. Well, I think that maybe he mentioned their names, yes, as being parties that were in there, yes, but of course, in mentioning them, he—there was others, of course, as well as them.

Recross-examination:

Q. And he thought that you people who had stock there ought to help to lease the land around there?

A. Yes sir he spoke that way.

Q. So that all those outside people could not come in there?

A. Yes sir.

Mr. BENNETT: We move to strike out the answers of the witness as not being the question that was asked of the witness Gesner on the stand. I will state to your Honor that I am not clear about the matter. It is very difficult to say whether the answer he intends to make was responsive to the question that was asked of Dr. Gesner or not; but we make the motion.

Objection overruled; defendants except.

Excused.

530 Thereafter one A. B. McALPIN, was called as a witness and after testifying that he was a photographer and that he had made seven certain photographs of different points on the timber claim of M. R. Biggs, one of the defendants, said photographs were offered in evidence, whereupon the defendants and each of them objected to the introduction of each of said photographs upon the ground that there is no allegation in the indictment that the defendants caused anybody to testify falsely in relation to the character or quality of the land, or as to its being chiefly valuable for its timber, and that said testimony was incompetent and immaterial and tended to confuse the issue, and upon the ground that they refer to the claim of one of the defendants and not to the claim of any person whom the defendants were charged with conspiring to suborn, but the objection as to each photograph and as to all of them was overruled and each of the defendants then and there excepted to the ruling upon each of said photographs, and their exceptions were severally allowed, said photographs tended to show that the timber upon certain parts of said claim were thin and poor. And thereafter the witness identified six other photographs as being photographs taken on the claim of the defendant J. N. Williamson, and these photographs were offered in evidence to which the defendants offered the same objections as in the photographs in relation to the Biggs claim, and there was the same ruling and exception.

And thereupon photographs of the claims of several of the applicants were offered in evidence and received subject to the same objection and exception except as to the matter of their being applicants rather than defendants.

The following is all of the testimony of the aforesaid witness A. B. McAlpin introduced at the trial.

531 A. B. McALPIN, Witness called on behalf of the Government, being first duly sworn, testified as follows:

Questions by Mr. HENEY:

—. Mr. McAlpin what is your business?
A. I am a photographer sir.
Q. Here in Portland?
A. Yes sir.
Q. Did you make some photographs of places up in township 15 south of range 18 east and 15 south of 19 east, Willamette Meridian?
A. Yes sir.
Q. Have you made more than one trip there?
A. Yes sir; I made on- trip and took photographs on July 23rd and 24.
Q. This year?
A. Yes sir; of this year.
Q. Who was with you then?
A. Mr. Mitchell, Mr. Murray and Mr. Edgar.

Q. That is David Edgar, John C. Murray and William J. Mitchell?

A. Yes sir; they were with me in the timber. We also had a driver on the first trip, who just went with us to the sheep shearing plant.

Q. And will you show us which photographs you took up there on that occasion?

A. Yes sir. That is the first trip?

Q. Yes.

A. Those large photographs, Mr. Heney.

Q. All of these large ones?

A. Yes sir.

Q. What claim do the photographs marked 1 to 7 now handed you represent?

532 Mr. BENNETT: May it please Your Honor, I suppose we may as well interpose our objection to those now as at any time. This matter was all ruled out by Judge De Haven, and I think entirely properly. There is no allegation in the indictment and no claim that we caused anybody to testify falsely in relation to the character or quality of the land or as to being chiefly valuable for its timber; no claim that there was any false statement in relation to that matter. On the contrary the indictment directly charges that these lands were subject to filing under the timber-and-stone Act, and of course it necessarily follows that they were chiefly valuable for the timber.

Mr. HENEY: This is a circumstance which we offer in evidence as tending to show the intent of the parties in having these entries filed up there, as bearing upon the question as to whether they did make the agreement with the entrymen which has been testified to by certain of the entry men.

COURT: I overrule the objection.

Mr. BENNETT: We take an exception, Your Honor, and we wish our objection and exception to go to each question and answer in relation to these photographs and to the admission of each photograph as it is offered. It won't be necessary to renew our objection at each time. I don't know whether we fully stated the ground of our objection in legal terms. Our objection is upon the ground that it is incompetent, immaterial and tends to confuse the issues and also we object upon the ground that the photographs were not taken at the time when these filings were made nor is there any evidence that the claims were in the same condition at the time the photographs were taken that they were at that time.

COURT: I overrule the objection. The Court understands that this objection applies to the introduction of all photographs
533 of the character of the premises referred to, and the objection is overruled as to all objections, and exceptions noted.

Q. Now, Mr. McAlpin, of what particular tract of land is that lot of photographs you now hold in your hand, numbered 1 to 7?

A. These photographs from 1 to 7 were of the M. R. Biggs claim in Section 20, 15 south of range 19 east.

Mr. BENNETT: Now, Your Honor, we renew the objection in relation to these photographs on the further ground that they refer to the claim of one of the defendants and not to anyone described in the indictment.

COURT: They were all transactions about the same time?

Mr. HENEY: One and the same transaction. Biggs took his up on the same day Williamson and Gesner took theirs and on the same day with seven or eight of these other entry men, and the money for the Biggs claim was furnished by Gesner as shown by these bank accounts that are in evidence, taken in connection with the letters and the checks.

COURT: It is competent.

Mr. BENNETT: We take an exception as to each, Your Honor.

Q. Will you explain those photographs please?

A. The point from which they are taken, sir, and the various data?

Q. Yes.

A. Number 1 was taken from about the center of the south line of the southwest quarter of the southwest quarter of section 20, looking north.

Mr. BENNETT: Is it noted on the photograph?

A. Yes sir.

Q. As to any of these photographs that you took was there any evidence of any fire having taken place there within the last five years that changed the appearance of the timber?

534 A. No sir; I do not think in a single case that there was evidence of any recent fires.

Mr. HENEY: We will offer number 1 in evidence.

Marked Plaintiff's exhibit 155.

Q. Now will you explain number 2.

A. Number 2 is looking north from the south line of the northwest quarter of the southwest quarter the same section, township and range.

Mr. HENEY: We will offer Number 2.

Marked Plaintiff's Exhibit 156.

Q. Number 3 will you explain?

A. Number 3, looking southeast on the northwest quarter of the southwest quarter from the north line, the same section township and range.

Mr. HENEY: We will offer that in evidence.

Marked Plaintiff's Exhibit 157.

Q. Explain Number 4?

A. Number 4 is looking east—northeast—onto the southeast of the northwest quarter from the southwest of the northwest quarter, section 20, same township and range.

Mr. HENEY: We will offer Number 4.

Marked Plaintiff's Exhibit 158.

Q. Number 5?

A. Number 5 is looking north taking in the southwest of the northwest quarter from the line, the same section township and range.

Mr. HENEY: We will offer Number 5.

Marked Plaintiff's Exhibit 159.

Q. Explain Number 6?

A. Number 6 is looking north showing part of the northwest quarter of the northwest quarter. The Willamette Valley & Cascade Mountain Wagon road is in the foreground of the picture.

Mr. HENEY: We will offer Number 6.

535 Marked Plaintiff's Exhibit 160.

Q. Explain Number 7.

A. Number 7 is a photograph showing section corner of section-17, 18, 19 and 20, and a witness tree which is on section 17.

Mr. HENEY: We will offer Number 7.

Marked Plaintiff's Exhibit 161.

Q. Now, on the first trip did you make any other photographs?

A. Yes sir; we made photographs of the Williamson claim in section 18, township 15 south range 19, east, and of Mrs. Williamson's claim.

Q. That is what section?

A. That is section 14, township 15 South range 18 east.

Q. Now I hand you photographs marked 40 and 41, 15, 16 and 17. Are those photographs of the S. V. Williamson claim?

A. Yes sir; these are the photographs of the S. V. Williamson claim. 40 and 41 were made on a subsequent trip from the other three.

Q. The large ones are the first trip?

A. Yes sir.

Q. Will you explain those?

A. Number 15 is looking west from the middle of the east line of the northwest quarter of the northeast quarter, section 14 township 15 south range 18 east.

Mr. HENEY: We will offer Number 15.

Marked Plaintiff's Exhibit 162.

Q. Explain Number 16?

A. Number 16 is looking west over the east line of the northeast quarter of the northwest quarter, section 14 the same township and range.

Mr. HENEY: We will offer Number 16.

Marked Plaintiff's Exhibit 163.

Q. Explain Number 17?

A. Number 17 is looking west over the middle of the east

536 line — the northwest quarter of the northwest quarter, same section township and range?

Mr. HENEY: We will offer Number 17.
Marked Plaintiff's Exhibit 164.

Q. Will you explain Number 40?
A. Number 40 was taken on the 18th of August and is on section 14 township 15 south range 18 east; about 80 rods west of the north east corner of section 14.

Mr. HENEY: We will offer Number 40.
Marked Plaintiff's Exhibit 165.

Q. Explain Number 41.
A. Number 41 is a photograph taken on Section 14 township 15 south and range 18 east; about 240 rods west of the north east corner of section 14.

Mr. HENEY: We will offer Number 41.
Marked Plaintiff's Exhibit 166.

Q. I hand you photographs Number- 8, 9, 10, 11, 12, 13. Were those taken on that first trip?
A. Yes sir; they were taken on the first trip.
Q. What claim do they refer to?
A. They refer to the J. N. Williamson claim.
Q. Will you explain each of them?

Mr. BENNETT: The same objection goes as to these as to the Biggs claim—the same objection as in the Biggs claim.

A. Number 8 is looking south showing the southeast quarter of the southeast quarter section 18 township 15 south range 19 east; about 20 rods south of the line of the quarter, the same township and range.

Mr. HENEY: We will offer Number 9.
Marked Plaintiff's Exhibit 168.

Q. Explain Number 10?
A. Number 10 is looking north on the southeast quarter of
537 the northeast quarter, 20 rods from the east line of the forty, same section, township and range.

Mr. HENEY: Offer Number 10.
Marked Plaintiff's Exhibit 169.

A. Number 11 is a defective photograph which was taken over on a subsequent trip.
Q. Is that here?
A. Yes sir; that was among these others.
Q. Explain 12, we won't offer 11.
A. Number 12 is looking northwest on the northeast quarter of the northeast quarter of the same section, township and range.

Mr. HENEY: We will offer Number 12.
Marked Plaintiff's Exhibit 170.

A. Number 13 is a defective photograph. It was taken over on a subsequent trip.

Mr. HENEY: We will offer that.

Q. Will you find 11 and 13?

A. I think they are in that other package, Mr. Heney. Number 13—I would like to say that some of these small photographs duplicate the number of these large ones. They were taken on a subsequent trip—a new series of numbers. They could be identified by the size.

Q. Number 13 is the same as this Number 13, I guess?

A. No sir; we kept the series of numbers entirely distinct. "Number 13, small" would identify it.

Q. Well there doesn't need to be any connection between the two?

A. Number 13?

Q. Small photograph.

A. Small photograph is taken from the southeast quarter of the northeast quarter of section 18 township 15 south, range 19 east; that is the Williamson claim and showing the sheep shearing plant.

538 Mr. HENEY: We will offer that 13—small.

Marked Plaintiff's Exhibit 171.

A. Number 14, small photograph was taken on the northeast quarter of the southeast quarter same section, township and range.

Mr. HENEY: We will offer 14—small.

Marked Plaintiff's Exhibit 172.

A. Number 31 is taken on the northeast quarter of the southeast quarter of the same section, township and range, showing the spring.

Mr. HENEY: We will offer Number 31.

Q. Where was that taken from?

A. That was taken on this quarter, sir.

Mr. BENNETT: Taken where?

A. Taken on the northeast of the southeast.

Marked Plaintiff's Exhibit 173.

Q. Now then was any other claim photographed on that trip than the Biggs and the two Williamson claims?

A. No sir. Those were the only photographs made on that first trip.

Q. Now did you make another trip up there?

A. Yes sir.

Q. That was when?

A. We made another trip and made photographs on August 15-16, 17 and 18.

Q. And on that trip did you photograph the claim of O. L. Parker?

A. Yes sir.

Q. I will show you photographs, 23, 24, 25 and 26, and ask you to explain them.

A. 23 was taken on the southeast quarter of the southwest quarter, Section 26 township 15 south, range 19 east.

Mr. BENNETT: Where was it taken from?

A. The southeast quarter of the southwest quarter.

539 Mr. HENEY: We will offer Number 23—small.
Marked Plaintiff's Exhibit 174.

A. Number 24 is taken on the northeast quarter of the southwest quarter the same section, township and range, looking south and covering some of the same ground shown in the other photographs. The other however I have said was looking north.

Mr. HENEY: We will offer Number 24—small.
Marked Plaintiff's Exhibit 175.

A. Number 25 was taken on the southeast quarter of the southwest quarter, same section, township and range.

Mr. HENEY: We will offer Number 25—small.
Marked Plaintiff's Exhibit 176.

A. Number 26 was taken on the northeast quarter of the northwest quarter, same section township and range.

Mr. HENEY: We will offer Number 26—small.
Marked Plaintiff's Exhibit 177.

Q. I hand you photographs numbers 1 and 2 marked "C. A. Graves."
A. Number one is taken on the northwest quarter of the northwest quarter section 8, township 15 south range 19 east.

Mr. HENEY: We will offer Number 1 in evidence.
Marked Plaintiff's Exhibit 178.

A. Number 2 is a photograph of the northwest quarter of the northeast quarter of the same section, township and range from the north line looking south.

Mr. HENEY: We will offer Number 2 in evidence.
Marked Plaintiff's Exhibit 179.

Q. Have you photographs of the other quarter sections?
A. No; there were just two more of that—two of the Graves claim.
Q. I hand you photographs 11 and 12, marked "M. Graves," and ask you to explain those?
A. Number 11 is the photograph, northeast quarter of the southeast quarter section 22, township 15 south range 19 east.

540 Mr. HENEY: We will offer Number 12—small.
Marked Plaintiff's exhibit 181.

Q. I show you photographs numbers 32, 33, 38 and 39. What claims are they representations of?
A. These are photographs of the claim of Mrs. N. O. Jones. Number 32 shows the southeast quarter of the southwest quarter, section 6, township 15 south, range 19 east.

Mr. HENEY: We will offer Number 32—small.
Marked Plaintiff's exhibit 182.

A. Number 33 is a photograph of the northeast quarter of the southwest quarter of the same section, township and range.

Mr. HENEY: We will offer Number 33—small.
Marked Plaintiff's Exhibit 183.

A. Number 38 is a photograph from the northwest of the southwest quarter, same section township and range.

Mr. HENEY: We will offer Number 28—small.
Marked Plaintiff's Exhibit 184.

A. Number 39 is a photograph of the southwest of the southwest quarter of the same section township and range.

Mr. HENEY: We will offer Number 39—small.
Marked Plaintiff's exhibit 185.

Witness excused for the present.

541 A. P. MCALPIN resumes the stand.

Cross-examination.

Questions by Mr. BENNETT:

Q. Mr. McAlpin, who was with you on these trips out in the Prineville country?

A. On the first trip there was Mr. Evans, Mr. Murray and Mr. Mitchell.

Q. On the second trip who was with you?

A. Mr. Mitchell and myself.

Q. Who showed you where to take these pictures—these different pictures?

A. Well, I had general instructions from Mr. Neuhausen before I went away to take them.

Q. Well, I am not asking you for your instructions from Mr. Neuhausen before you went away but I'm asking you there on the ground. Who, if anybody showed you where to take these pictures?

A. The cruisers would locate the point and I would take the picture.

Q. Which one in particular, Mr. Mitchell or the other gentleman?

A. Well, when they were all three working together they would agree that this was such a point *such a point* as we wanted, and I would take the picture from there. They tallied together as they paced off.

Q. They would select the point they wanted and they would tally to that point they wanted and then you would take the picture?

A. Yes sir.

Q. And when Mr. Mitchell was alone with you, who showed you where to take the picture from?

A. Mr. Mitchell would show me the point.

Q. Now I show you number 13—small. That, as I understand, is claimed to be a picture of some part of the J. N. Williamson claim?

542 A. That is taken from the Williamson claim.

Q. Well, is it any part of the Williamson claim?

A. Part of the Williamson claim would appear in the immediate foreground but it wasn't taken to show that, but the relation of the sheep camp or the sheep shearing plant, to the Williamson claim.

Q. Then this is a picture of Williamson's deeded land?

A. This is taken from the Williamson claim and looking over the sheep ranch. I don't know who owns that, sir.

Q. Now where does the line of the Williamson timber claim as you understand it, run across there in the foreground of the picture?

A. I should only approximately state by saying that I should judge I was about 20 rods inside the line.

Q. What line is that?

A. That would be the west line. This picture is looking southwest.

Q. Looking southwest?

A. Yes sir.

Q. Then what you call the west line of the Williamson claim wouldn't run parallel with the bottom of the picture?

A. No sir.

Q. How would it run?

A. Well it would run at an angle across that.

Q. Just show with the pencil about how it would run there?

A. I should judge the line would run about cross this way.

Q. Well, that's pretty nearly parallel—you are marking pretty nearly parallel with the picture—with the bottom of the picture aren't you?

A. Yes sir; but where it is brought down to a very small scale it is almost impossible, the deviation would be very slight.

Q. Then you were looking almost south or north?

A. The view is looking southwest.

Q. Almost southwest—a little west of south?

543 A. Well, sir, it is almost southwest, I should think.

Q. Well then the line of the claim would run diagonally, wouldn't it?

A. It would run diagonally, sir but in reducing it to such a small point the variation of the line from a straight one would be quite small.

Q. Well the variation would be a good deal of that line if you were looking southwest or nearly southwest?

A. It should be at first, but when so large a tract of country is brought down to a picture eight inches long, of course the deviation would be quite small.

Q. I wish you would mark on the margin if Mr. Heney has no objection, the point at which you understand the west line of the Williamson claim would leave that picture, on each margin—at each margin. Mark with a little "X"—mark on the margin where you claim it would leave the margin of the picture?

(Witness marks on picture.)

Q. Then you think that some part of that bottom there is on the Williamson claim?

A. Yes sir; there is a corner of the bottom on the Williamson claim.

Q. How far did you say you put the instrument from the line, about.

A. I was shown that point by the cruisers and the first picture from there was defective. On the second trip I went to the same point and took this picture.

Q. Well, I am asking you how far that way the instrument stood from where you claim the Williamson line to be, with the line of the Williamson timber claim?

A. I had no compass.

Q. I wish you would mark, if you can, on the picture the direction—is the picture so that you can mark what you understand to be the direction south from where you stood when you took
544 the picture, on that picture?

A. South would be to the left of the picture.

Q. There isn't room to mark?

A. No, sir.

Q. South would be out here somewhere?

A. Yes, sir; more to the left.

Q. Well, could you mark west on there? What would be the west line? Mark a "W" there.

(Witness marks the picture.)

Q. That would be about west would it?

A. And south would be out here; yes.

Q. At right angles with that?

Recess until 2 P. M.

A. B. McALPIN resumes the stand.

Cross-examination continued:

Q. Now, Mr. McAlpin whereabouts on the timber claim of J. N. Williamson as to the north and south, was this Number 13, showing the shearing plant taken?

A. It was taken on the line between the second and third forties going north.

Q. Between the second and third forties?

A. Yes, sir.

Q. Well, it was taken right in the middle of the claim north and south?

A. Yes, sir.

Q. Right in the middle of the claim north and south and about 20 rods from the west line?

A. Now I wish to correct that sir. I said 20 rods, but we went in 20 rods from the east line and that was taken from approximately that point, so it would be really about 60 rods to the west line of that claim.

Q. Oh, you say now, then, it wasn't taken 20 rods from the west line?

545 A. No sir. On consulting my data I find that we went in straight through that claim 20 rods from the east line of the claim.

Q. Have you talked with anybody about that since you were on the stand?

A. No sir; I consulted my data. I have seen no one since.

Q. You haven't talked with any person about it?

A. No sir.

Q. Would that make any change in where the line runs across this picture as you understand, that you have marked?

A. No sir; the line was about as I marked it.

Q. Only, as you claim now, this line that runs across there would be 60 rods from where you took the picture instead of 20?

A. Yes sir; that's right.

Q. That it would run across here in the same place?

A. Yes sir.

Q. Now where was Number 14—small taken?

A. I was located here by Mr. Mitchell as being some 20 rods east of the west line.

Q. East of the west line?

A. Of the claim; yes sir.

Q. Looking which way?

A. Looking, I think a little east of North.

Q. Looking east of north?

A. Yes sir.

Q. Whereabouts with reference to this shearing plant meadow was this taken? Where did you stand? Can you show the point on that picture about where you stood when this was taken?

A. No sir; the point is over to the left of the picture, and a little meadow that shows in Number 15, I think, shows in the extreme left hand corner of Number 13.

Q. In the left hand corner here?

A. Yes sir; the lower left hand corner.

Q. Now taking this picture from that point and looking in the way you were looking you would be looking out over the same—practically the same—country?

A. Yes sir.

Q. Over this same country that shows in the foreground of this picture?

546 A. Yes sir; that's right.

Q. So it would not represent two different spots, but practically the same spot taken from two different standpoints?

A. Well, part of it in the one picture does not show in the other or very slightly?

Q. But the background of this picture and the foreground of Number 13 are practically the same?

A. No sir; I wouldn't say that. The foreground of the one showing the shearing plant?

Q. Yes. And the background of this one are practically the same?

A. Yes sir; that is right.

Q. Now I show you number 8—large, the one that you have marked as showing the southeast corner of the southeast corner of section 18.

A. The southeast quarter of the southeast quarter.

Q. The southeast quarter of the southeast quarter?

A. Yes sir; the southeast quarter of the southeast quarter of section 18.

Q. Where was that taken from?

A. That was taken from the line between the first and second forties going north 20 rods west of the east line and looking south.

Q. And on a line as you estimated it between the south forty claim and the next forty north of it?

A. Well I didn't estimate that, sir. The three cruisers located me there as being that point.

Q. Well, that was what they estimated then?

A. Yes sir.

Q. That is if this is the Williamson claim here running a mile north and south—that is the way you understand it runs don't you, a mile north and south—now you would be on this line between the south forty here and the next forty above and 20 rods from——

A. About that point, sir, looking south.

Q. 20 rods from the east line and you would be looking south?

A. Yes sir.

547 Q. Then the claim extends from this point down through the timber that shows here for a quarter of a mile from where you were standing?

A. That is number 9, sir.

Q. Number 8?

A. Yes.

Q. For a quarter of a mile from where you were standing and all this timber down in here in the background was on that forty?

A. Yes sir.

Q. Now something has happened to your light here which has destroyed the base of these trees, but that's the top of trees in there, is it?

A. Yes sir.

Q. In the left hand margin of this number 8 on which side of this picture—looking south—the line that you were nearest to would be on this side of the picture, would it?

A. Yes sir. That's right.

Q. That's the line that you were nearest to?

A. Yes sir.

Q. And that would be about 20 rods from where you were taking the picture?

A. Yes sir.

Q. And the line on the other side would extend 60 rods out that way?

A. Yes sir.

Q. What is this mark on the tree?

A. That is a man standing in front of the tree, sir.

Q. Here?

A. Sir?
Q. That's not a man standing in front of that tree, is it?
A. Yes sir.
Q. Here's a man over here?
A. Yes sir.
Q. But this is not a man here, is it?
A. Yes sir; that was a man also.
Q. Look carefully there. Isn't that a place where the tree has been chopped?
548 A. No sir; that is where a man is standing.
Q. I am talking about this tree right in the middle of the picture.
A. Yes sir.
Q. You claim that is a man there?
A. Yes sir; that was a man there.

COURT (after examining the picture): That is a man, Judge. Turn it to the light.

Mr. BENNETT: It may be. I don't say that it isn't your Honor; I was just asking him whether it was or not; it may be. It doesn't show very plain what it is.

Q. Now I show you Number 9 which is marked "looking south on the northeast corner of the southeast corner of section 18" and which has a note at the side here, "20 rods from the east line." Now where was that taken? Have you a township plot there?
A. Yes sir. This is looking south on the northeast quarter of the southeast quarter.
Q. Is that quarter instead of corner?
A. Yes; it is just the northeast of the southeast.
Q. Now whereabouts was it taken from?
A. It was taken looking south and just in the middle of the claim.
Q. In the middle of the claim?
A. Yes sir; right between the two middle forties here.
Q. And 20 rods from the east line?
A. Yes sir.
Q. Looking south then, from here?
A. Yes sir.
Q. Down through this half mile?
A. Yes sir. It doesn't show beyond the 40 on account of the timber.
Q. The timber is so thick you can't see across but one forty there?
A. Yes sir; that's the case.
Q. And all this timber that is shown in the picture is on this forty here?
A. Yes sir.

Mr. HENEY: That doesn't show in the record what forty you are referring to.
549 Mr. BENNETT: I am referring now to the northeast quarter of the southeast quarter.

Q. That is right isn't it?

A. Yes sir; that is right, sir.

Q. Does the point from which this picture was taken appear on Number 14 and Number 13 to which I have already called your attention? Does the point from which Number 9 was taken appear on Number 13 and Number 14 or either of them?

A. No sir; that exact point does not show. It was taken close to that but perhaps 3 or 4 rods to the west.

Q. From what point?

A. From the point at which Number 9 was taken.

Q. Well I say, from what point on this picture was this taken—3 or 4 rods from it?

A. It was taken over toward the east. Number 9 was taken toward the east from Number 19.

Q. Well, that would be which way on the picture? Over this way or over this way or this way?

A. It is right out of the foreground of the picture.

Q. Right opposite the foreground?

A. Out of the foreground?

Q. And how far, say from this point that appears at the bottom margin of the picture?

A. Was Number 9 taken?

Q. Yes. How far from the center of the foreground of this picture?

A. I should judge 3 or 4 rods or something like that.

Q. 3 or 4 rods from the center and looking right the other way was it?

A. Well one was looking south and the other was looking southwest.

Q. Now does that point where Number 9 was taken appear on number 14?

A. Well, sir, this is taken from the meadow and looking up toward the other, but I couldn't say exactly as to whether that
550 precise point appears but it would be about in the center of this picture.

Q. About in the center here?

A. Yes sir; up on the hill.

Mr. HENEY: What number picture is that?

A. Number 14.

Q. And looking in which direction from the perspective of this picture?

A. Well, it would be looking about northeast from here—from this picture, as we look at this picture.

Q. Now in looking at this picture you are looking down this way?

A. Yes sir.

Q. Now from the point where that would be up on the hill—wherever it would be, where that picture was taken from—which way on the picture would that picture be looking right straight ahead or to your right or to your left?

A. It would be looking to the right.

Q. Directly at right angles, to the right?

A. It would probably be obliquely.
Q. Obliquely to your right?
A. Yes sir.
Q. Looking off, then, in this way?
A. Yes sir.
Q. And this would be a close view of this timber that shows here?
A. Yes sir; some of the timber that shows in there would probably show in this picture.
Q. This is a close view of it and this is a distant view?
A. Yes sir.
Q. Now look at Number 12. Where was it taken?
A. Number 12 is looking north from a line between the third and fourth forty, going north; it shows the north forty of that claim.
Q. Shows the north forty of the claim?
A. Yes sir.
Q. From the south line of that forty?
A. Yes sir.
Q. Where with reference to the east and west line of the claim, was it taken?
551 A. I haven't my data as to that sir; but I think it is taken on the same line as the others were; that is 20 rods west of the east line.
Q. Then it would — taken over in here sowewhere?
A. Yes sir.
Q. And would be looking in what direction?
A. Looking north.
Q. North directly, or northwest.
A. This is northwest. No, pardon me, this is looking northwest; yes sir.
Q. Then it would be looking diagonally across toward this corner?
A. Well not a sharp diagonal. It was looking more west. It was looking west of north.
Q. Bearing which way from a northwest course; bearing north or west from a northwest course?
A. Well sir as to the points of the compass to that fine degree I could not tell you, but I could show you approximately about the way we looked, I think, from this point right across this way, just broadly across the claim there.
Q. And your point of view would have come out probably how far from the northwest corner of the claim?
A. Well sir, the angle of this lens is not great, so it would not show I don't think even if the view were extended more than within a third of the corner line of the claim.
Q. Now which direction on this picture would have been directly north?
A. Say the picture is pointed toward the northwest, north would be in this direction.
Q. North would be in here?
A. Yes sir.
Q. Now is there a slope coming down from that direction to the point shown in the picture?

A. As I remember that particular point, there was a gentle slope this way.

552 Q. And was that covered with timber similar to this that shows in the right hand foreground? The right hand middle ground?

A. Yes sir; I think it was very much of that same character.

Q. So if this picture had been taken from this point directly toward the north, it would have shown a body of timber similar to that?

A. Well it is more or less broken through there and there are bunches of timber.

Q. Well I say, it would have shown a general body of timber? similar to that?

A. I think it is somewhat broken as this is, but there is more or less very young growth of fir and scrub trees and brush in the immediate vicinity of the camera, so to get any extended view it was turned.

Q. That is to get any extended view you had to turn the camera in the direction where there was less timber?

A. Well where there was less undergrowth and small fir trees, which frequently made a slight change in the position necessary.

Q. Now, this is a little rocky glade in the timber there?

A. Yes sir; there is more or less rock on that forty.

Q. About how big a glade is this—this open place that shows here?

A. Oh, I should judge that to where the men are standing was about 100 feet, but it shows beyond there, I should think, a little short of a quarter of a mile.

Q. That is the whole picture?

A. Yes sir, the extreme distance, that is shown there.

Q. But this little rocky glade here upon the edge in which the men were standing, you think that the distance from where the camera stood to where these men stood was about 100 feet?

A. Yes sir.

Q. It shows up more than that because of being so close in the foreground?

A. You mean the rocks, sir?

553 Q. I mean that the distance as compared with the distance back shows up larger because it is so close to the camera.

A. No sir; on this occasion I used a lens of not a great angle, or an angle between 65 and 70 degrees. Had I used a very wide angle lens the foreground of the picture would have shown up very much larger than its proper proportion. This is about the angle that the eyes take in and it gives a more correct perspective.

Q. Well, you can govern that in a photograph, can you?

A. You can govern it by the use of the lenses yes sir.

Q. And you can make the respective parts of the picture look large or small as you see fit as compared to the ground, by using a wide angle lens?

A. You can make the foreground and anything in the foreground larger than its true perspective and it runs off very violently so that the distance is very much smaller.

Q. And by using a lens with a narrow angle you can make the foreground appear comparatively too small.

A. By using a lens of great angle; yes sir.

Q. So that you can govern that by the kind of lens you use?

A. Yes sir.

Q. And you used a lens which made it appear about 100 feet from the place where these men stood?

A. Yes; this lens.

Q. Yes. Now about how far was it from where the camera stood back to these trees in the distance in the center?

A. Well sir I should judge it was a little less than quarter of a mile.

Q. Well then, you use a lens which made 100 feet seem more than have as great a distance as a quarter of a mile, didn't you?

A. Well in any picture the foreground occupies relatively a very much greater space than the middle distance or the distance.

554 Q. So it makes it look as though 100 feet was half the distance to a point a quarter of a mile away?

A. Yes sir, I think that is a true perspective on that.

Q. Now look at 31. Where was that taken from? It shows a little spring doesn't it?

A. Yes, this was taken near the wagon road, and I was located there by Mr. Mitchell as being on this particular quarter of the Williamson claim—the northwest quarter of the southeast quarter.

Q. That is this quarter here?

A. Yes sir.

Q. The northeast southeast?

A. Yes sir.

Q. That would be this corner here?

A. Yes sir.

Mr. HENEY: What is the number of that photograph?

Mr. BENNETT: No. 31.

Q. Now, Mr. McAlpin, about how far is it from the point where this picture was taken, where the instrument stood, back to this timber here?

A. I should judge that was about 200 feet to the first timber beyond.

Q. Yes. Then the area shown by this picture is about 200 feet, that is at the left hand of the picture—in the left—the timber in the background in the left is about 200 feet from where the camera stood?

A. Yes sir, I should judge about that.

Q. And how far are these trees in the right? These two or three large trees in the right of the picture, how far were they from where the camera stood?

A. They sir, I should judge, were nearer, I should think; they were about 125 or 150 feet.

Q. So that is really a picture of another little glade around a spring?

A. Yes sir.

555 Q. Now, at the time you took this picture of the spring, were you standing at the upper end of this prairie that is shown on No. 14, to which I have called your attention?

A. Yes sir, we were up the road, and I think just before we come down a little hill to this prairie.

Q. Is this little glade here a part of this prairie, the end of it?

A. Well it is I should judge right in here a little higher up and high just before you come to the prairie.

Q. Well isn't it a part of this same prairie?

A. Well this is on a little side hill, and it isn't quite down on the prairie.

Q. Well, isn't it at the commencement of this prairie?

A. Yes sir, it is up in the hill here; not at the prairie itself, but just about the commencement of it.

Q. So you practically took three pictures of the same prairie, that is some part of it?

A. Well the spring does not show at all in the other picture.

Q. Now, Mr. McAlpin, does this picture No. 10 show this same ridge that appears in No. 14 from a different standpoint?

A. No sir. I could hardly say that that would appear in that. It might show a little bit of the same, but this No. 10 is farther over than No. 14.

Q. Farther over which way?

A. That is, it is farther to the east. No. 10 shows as well as I can show it on this No. 14; from in here looking up this way it might show the extreme edge but I doubt it.

Q. Well now, is this the point from which that picture was taken—does that appear on this?

A. No sir, I should say not.

Q. Where would it be—the point where that was taken with reference to this picture?

A. It would be in this, I should judge, and farther over.

Q. Farther over this way?

556 A. Yes sir. This is taken on the west side of the 40 claim, and this picture is taken over on the east side.

Q. Oh, this one looks west does it?

A. This one is looking west and north.

Q. And that one is looking east and south?

A. This one is looking directly north.

Q. Well then, doesn't it take in—does the scope of the picture take in all or part of the same country exactly?

A. No sir, I should say that none of this No. 10 are these in No. 14.

Q. It would look farther over this way in this picture?

A. Yes sir, and farther to the east.

Q. Farther back?

A. Yes sir.

Q. There is a little ridge runs up through there, isn't there?

A. I didn't understand you.

Q. I say there is a little rocky juniper ridge runs up in there, isn't there?

A. Yes sir.

Q. That land isn't fit for cultivation at all, on that rocky juniper ridge?

A. No sir, I should say not.

Q. And it is pretty dry isn't it?

A. Yes I should judge it was very dry.

Q. And there isn't much grass grows on it even?

A. Well there is more or less grass grows through all that country, even on the ridges.

Q. Yes, but on these rocky ridges there is very little grass grows isn't there?

A. Well sir, there is more or less grass all through the timber and all through the rocks in that country.

Q. Yes, and on the rocky juniper ridges, it is decidedly less, isn't it? You say there is more or less.

A. Yes sir there is less at those points.

557 Q. Now, taking the S. V. Williamson claim, you know how that lays do you?

A. Yes, sir.

Q. It lays a mile east and west, don't it?

A. Yes, sir.

Q. And is the north tier of 40's in section 14?

A. Yes, sir; that is right.

Q. Now take No. 16, where was that taken with reference to the line of Mrs. Williamson's claim. Mrs. Williamson's claim would lay like this wouldn't it? Along here like this?

A. Yes, sir.

Q. The north tier of the 40's in the section?

A. Yes, sir.

Q. Where was that taken from?

A. This is looking west from the east line of the N.E. quarter of the N.W. quarter.

Q. Whereabouts on the line north and south?

A. It was taken about the middle of the 40.

Q. Out here then would it be?

A. Yes, sir.

Q. Would be where your camera would stand?

A. Yes, sir. Pardon me, when I say the middle of the 40, I mean—let me locate that one please; yes, sir, taken about the middle of the claim.

Q. Every way wasn't it?

A. Yes, sir.

Q. Right about the middle of the claim north and south and the middle of the claim east and west, and looking west?

A. Yes, sir.

Q. And looking across this way, right across the 80?

A. Yes, sir.

Q. However, you cannot see the whole 80, can you, at all?
558 A. No, sir, you can't.
Q. On account of the timber?
A. Yes, sir.
Q. Now about how far was it, from where your camera stood to where the man stands in the picture?
A. I should think between 30 and 40 feet.
Q. And how far is it from where your camera stood to the edge of the timber as it appears in the picture, right opposite in the center of the picture?
A. I should judge between 200 and 250 feet.
Q. Then these little glades or open spaces extended for about 125 feet in the center of the picture?
A. Yes, sir.
Q. Now what character of country is this to the right—to the right hand margin of that picture? Is it a slope down from the margin?
A. On that claim there is a slope runs almost through the center of it, sloping to the west.
Q. Now where is that ridge with reference to this picture, on the right hand side or the left hand side?
A. The highest point of the ridge is to the right of the picture, at this particular spot.
Q. Well, is there a little gulch running down through there?
A. Do you mean beyond here, sir?
Q. Right as you are looking at the picture. Looking right with the picture right down the center of the picture, is there a little gulch down there, or depression?
A. I think, as you run out there sir; I think if you follow this line you would run down into a creek, and the gulch on in.
Q. Well, now doesn't the country rise on both sides of this little depression here, rise up this way and up this way?
A. Yes, sir. The creek is down in a little canyon and the country rises on either side of it.
559 Q. Well, now is that whole slope to the right of the margin of the picture covered with timber such as is shown there?
A. Well, sir, it is more or less of this description, broken with small glades.
Q. Some small glades like this one?
A. Yes, sir.
Q. Now, I will show you No. 15; that represents the S. V. Williamson claim also, doesn't it?
A. Yes, sir.
Q. Where was it taken from?
A. This is looking west from the middle of the east line of the N.W. quarter of the N.E. quarter.
Q. Then that would be just a quarter of a mile further east than the one we have looked at, would it?
A. A quarter of a mile further east; yes, sir.
Q. And would represent this point?
A. Yes, sir; that is right.

Q. That is this picture being taken here, the one that I now show you would be taken here, right in the center, both of them being taken in the center of the claim north and south, and this one a quarter of a mile farther east?

A. That is right here.

Q. And this shows the timber between the point where it was taken here and this point where this one was taken?

A. Yes, sir.

Q. Towards the west. And where is this one taken from? I show you No. 17?

A. No. 17 is looking west from the middle of the east line of the N.W. quarter of the N.E. quarter.

Q. The middle of the east line of the N.E. quarter; then that would be taken right in here?

A. Yes, sir.

Q. At this point and it would show the timber looking
560 right down the center of this 40?

A. Yes, sir.

Q. This timber was hid in this picture by the thick intervening timber?

A. Yes sir.

Q. And the view of this picture was hid in this one from the same cause?

A. Yes sir.

Q. Now I show you No. 40. That has reference to the same claim. Where was No. 40 taken from? First, I will ask you, did you take a picture from this point here on the middle line of this 40?

A. Yes, we took a negative there, and I had to change my plates under a blanket in the day time; that accounts for the fog on several of these pictures and for that plate being destroyed.

Q. Oh, you didn't get—you have no picture of this?

A. No sir, I have none of that.

Q. Where was this picture taken?

A. No. 40 was taken on the second trip of the S. V. Williamson claim and 80 rods west of the N.E. corner of section 14.

Q. 80 rods west of the N.E. corner of Section 14?

A. Yes sir.

Q. That would carry it out to here; to the center; that would carry it out a quarter of a mile?

A. A quarter of a mile, yes sir.

Q. Now it was taken then at that point?

A. Yes sir.

Q. And looking which way?

A. Looking south.

Q. Looking right across the 80?

A. Across the 40 sir.

Q. Well across the 80; that is it was right on the line between the

A. Yes sir.

561 Q. If you looked south you would look straight across the 80?

A. No, these are in a string east and west.

Q. If you were looking south your perspective would take in part of each 40?

A. Yes it would take in part of each 40, you might say, looking across the line between the two 40's.

A. And taking in part of both 40's.

two 40's, wasn't it?

A. Yes sir.

Q. Now I wish you would mark about where the line between the two 40's would run, there on the picture; mark on the background?

A. That is marked with a cross sir.

Q. Marked with a cross here?

A. Yes sir.

Q. Now referring to M. R. Biggs' claim; look at No. 7; where was that taken from?

A. That is taken showing the corner stone and the witness tree of sections 17, 18, 19 and 20.

Q. Where was it taken from?

A. It was taken right from the corner stone almost; the corner stone just shows in the foreground.

Q. What section were you on?

A. I don't know sir. When he located the tree, I took a picture.

Q. Which way does the picture look?

A. Looking northeast, is the memo. we have on it.

Q. Looking northeast?

A. Yes sir.

Q. From that you can tell what section it was on, can't you?

A. The bearing tree was on Section 17.

Q. I mean you can tell where your camera was—the direction. From the fact it shows the corner stone and is looking northeast, you say?

A. Yes sir. I think it was on section 19, looking diago-
562 nally across to 17?

Q. You think you were on section 19, looking diagonally across to 17 do you?

A. Yes sir.

Q. Now, Mr. McAlpin, I show you No. 3; where was that taken from—having reference to the Biggs claim also?

A. This is looking southeast on the N.W. quarter of the S.W. quarter from the north line.

Q. Whereabouts on the north line?

A. About 20 rods west from the east line.

Q. Are you sure of that, or was it east from the west line?

A. Looking southeast from the north line, I have it, sir.

Q. But is the point you took it from 20 rods west of the east line or 20 rods east of the west line?

A. It is 20 rods west of the east line.

Q. Then the point that you took that picture from was off here somewhere?

A. Yes sir.

Q. And you would be looking this way?
A. Yes sir.
Q. You wouldn't be looking over very much of the Biggs claim then?
A. No, sir, I was here looking on to—show part of the Biggs claim in the foreground.
Q. Now then, where would the Biggs claim be on that picture? Over here?
A. Yes sir; the Biggs claim would be right in here and might extend out beyond these trees.
Mr. HENEY: What is that number of that photograph?
A. No. 3.
Q. Now then, how far is it from the place where the picture was taken to the line of the timber in the center there?
A. I should judge between 200 and 300 yards, possibly less.
563 Q. Probably less?
A. Yes sir.
Q. A good deal less, wouldn't it?
A. Well, less instead of more, but I should judge approximately about that.
Q. How far is it from the place where the picture was taken to where the man stands?
A. I should judge it was about 70 to 80 feet.
Q. Why didn't you take the picture from the middle of the 40, in that case as you did in the Williamson cases?
A. That was taken to look off to another claim; there is another picture taken from that same point showing the Biggs claim.
Q. This picture was taken to look off on to what claim?
A. I don't know what claim it was, sir. Off to the southeast there but there was some other claim that they wished to show.
Mr. HENEY: Jennie D. Picket wasn't it?
Q. Was it the Jennie D. Picket claim?
A. I think that was it, yes sir.
Q. This picture shows the Picket claim then, does it?
A. It would show the Picket claim in the distance.
Q. And this timber here is mostly on the Picket claim?
A. That in the immediate foreground, I should say was on the Biggs claim, and in the distance was on the Picket claim.
Q. That in the immediate foreground is on the Biggs claim, and that in the distance is on the Picket claim?
A. Yes sir.
Q. Now, I show you No. 6. Where was that taken from?
A. This was taken on the Biggs claim and shows the north part of the north 40.
Q. Where was it taken from?
A. I haven't the data down here, sir, but as my memory serves me it was taken at the same point that those others were—20 rods west of the east line.
564 Q. And in the middle of the claim north and south?
A. No sir. This shows the north 40 of the Biggs claim.
Q. Well, the other picture that you referrer to—you say this

was taken from the same point—was taken from the middle of the claim, wasn't it?

A. Not this one, sir. There is another picture still, I think No. 4.

Q. Did you run out the line what would be the west line of the Biggs claim? Did you make any attempt, or anybody while you were there make any attempt to run out that line?

A. They found the section corners shown in the photograph of 17, 18, 19 and 20 and the 3 cruisers ran out the line and found the corner stone and bearing tree between 19 and 20 and 29 and 30.

Q. That is taken here?

A. Yes sir.

Q. Did anybody try to run out this line a quarter of a mile from the section line?

A. That would be the east line of the claim?

Q. Yes.

A. No sir. Not while I was with them.

Q. They was just guessing at it?

A. They paced; the cruisers paced the line, and placed me there.

Q. Paced the line through, or just paced out there from the other line at different points?

A. Paced out from the section corner yes sir.

Q. Now whereabouts was this picture taken with reference to the east and west line as you guessed at it? That is, as you guessed at the east line of the claim?

A. That would be taken in here, sir.

Q. Not on the line then, between the two 40's?

A. Yes sir.

Q. Well, here would be the line between the two 40's, wouldn't it across here somewhere?

565 A. Yes sir; well the line isn't drawn across the claim.

Q. About here somewhere?

A. Yes sir.

Q. About 20 rods from what you took or guessed at for the east line and in the middle of the 80, between the two 40's?

A. What the cruisers told me was 20 rods from the east line.

Q. Yes, what they approximated it at. Now which way was it looking?

A. That was looking north.

Q. Directly north?

A. Yes sir.

Q. Now how far is it from where your instrument was standing to where the man stood?

A. I should judge 80 to 90 feet; in that neighborhood.

Q. And how far is it to this timber—here in the middle I mean?

A. Well, sir, I should judge about an eighth of a mile possibly a little more.

Q. Is that a little hollow running up through there?

A. Yes, it is a little glade and a wagon road runs up it.

Q. And do the hills widen on each side of that glade?

A. Yes sir.

Q. To the left and to the right?

A. Yes sir.
Q. Is that the Prineville road?
A. Yes sir; this is the road that goes to Prineville. The Willamette Valley & Cascade Mountain road.
Q. Now here seems to be a body of timber; here in the left hand background; right in here; is that on the Biggs claim?
A. Yes sir.
Q. And this timber standing out here, how far does it extend in that direction do you remember?
A. Well sir, it is scattered more or less through there; I didn't go through there, but took the wagon road back to camp.
Q. How far does it extend out about like it is there?
A. I should judge that that timber extends to the edge of the claim more or less broken by small glades.
566 Q. And how far did you say it was again, it was from where the instrument stood to the edge of the glade here?
A. I judge about an eighth of a mile.
Q. How wide is the glade across here at that point?
A. I should judge the point that shows on the photograph is about 125 yards.
Q. Did you find any blazes? Did you find the blazes for the section line between 19 and 20 or did you just find the corner stone that is the north and south?
A. They found, I think, a few blazes, very few.
Q. Now look at No. 2. Where was it taken from?
A. No. 2 was looking north from the south line of the N.E. quarter of the S.W. quarter.
Q. That is from here, from this line?
A. Yes sir.
Q. Whereabouts on the line?
A. About 20 rods west of the east line.
Q. In here?
A. Yes, sir, that would be in there.
Q. And looking which direction?
A. Looking north.
Q. Directly north?
A. Yes sir.
Q. Now about how far is it from where the instrument is taken in that case to where this man stands? In the center of the picture the one farthest back?
A. I should judge about 150 feet.
Q. Why didn't you take that picture from the middle of the line instead of 20 rods from the east line?
A. We took all that series through about 20 rods west of the east line.
Q. On the same trip you were taking the Williamson sections from the centers, weren't you?
A. The S. V. Williamson we did, yes, sir.
Q. Well, didn't you also the J. N. Williamson?

567 A. No sir. That was taken one side of the line.

Q. What was the object in taking it one side of the line, instead of in the center?

A. The reason of that was the cruisers what was called "double ran" those claims; they went up one side of the claim about 20 rods from one line and came back about 20 rods from the other line so as to more thoroughly estimate the timber.

Q. And didn't go through the center at all?

A. No sir; they were about 20 rods from the center on their line on cruising.

Q. How long would you be in cruising one of these claims?

A. Well, sir, I think we started out on that Biggs claim from the corners of sections 18 and 19, 13 and 24. They found that corner went up and found the corner of 17, 18, 19 and 20; then ran down to the corner of 19 and 20, 30 and 29 and got through that claim after noon.

Q. What time did they go onto it in the morning?

A. I should judge sir—we had some difficulty in finding the corner of 17, 18, 19 and 20—I should judge they were about an hour and a half or two hours on that claim.

Q. On the entire claim?

A. Yes, sir.

Q. That includes hunting the corners?

A. No sir; that was after they found the corners.

Q. Now, I want to show you No. 1, being on the C. A. Graves claim. Where was that taken from?

A. That was taken from the N.W. quarter of the N.W. quarter of Section 8.

Q. The N.W. quarter of the N.W. quarter of section 8. The Graves claim lays a mile east and west, don't it?

A. Yes sir.

Q. And that picture was taken on the extreme western 40 of the claim?

A. Yes sir.

568 Q. And whereabouts?

A. On the north line of the 40, looking south.

Q. Whereabouts on the line?

A. That would be the center of the line, sir.

Q. Right there, eh?

A. Yes sir.

Q. Looking south?

A. Yes sir.

Q. Across that 40?

A. Yes sir.

Q. Then all this timber that is shown in here is on that 40?

A. Yes sir; I should judge everything that appears there is on that 40.

Q. This picture is also taken on the C. A. Graves claim; where from?

A. That was taken from the N.W. quarter of the N.E. on the north line, looking south.
Q. The middle of the line?
A. Yes sir.
Q. Then the timber that is shown in that picture is all on the NW quarter of the NE quarter?
A. Yes sir.
Q. Of the claim and in all these cases you found nothing but the outside lines of the section?
A. Yes sir.
Q. The rest was obtained from approximation or pacing out from that line?
A. Yes sir.
Q. You had no chain?
A. No sir.
Q. No tape line?
A. No sir.
Q. Or any measurement of any kind?
569 A. No, sir; otherwise than by pacing.
Q. Well, I say no measurements of any kind?
A. No, sir.
Q. Except by pacing?

Redirect examination:

Q. What kind of a lens is best calculated to give a perspective in the picture that would be measurably correct or measurably the same as the perspective of the natural eye?
A. Well sir the kind of a lens that I used in both trips a lens of not too extreme an angle; they make lenses that will include an angle of 100 degrees the larger the angle the lens includes the more the foreground is distorted and the smaller objects in the extreme distance appear relative to their true value.
Q. Then you selected a lens or lenses that you believed would give the most correct perspective as compared with the human eye?

Objected to as leading.

A. Yes, sir.

Mr. HENEY: He practically had said the same thing.
COURT: If you object to that let him answer what his purpose was in selecting the lens he did.

Q. What was your purpose in selecting the lens that you used?
A. It was to give a correct rendition of the country as it would appear to the human eye without exaggeration.
Q. Do you know of any lens that would give any nearer perfect perspective than the one you did use?
A. No, sir; I used it for that purpose.

Witness excused.

570 And thereafter one David Edgar was called as a witness and having testified that he was a timber cruiser, and that he had cruised a part of township 15-19 and especially section 24, in said township, was asked this question, "After looking at the memoranda, can you tell us, as to the general character of the N.E. ¼ of 24-15, 18 E.? To which the defendants objected on the ground that it was incompetent and immaterial, and that the defendants are not charged with suborning perjury in the matter as to the quality of the land, or the timber upon the land, and upon the ground that the indictment alleges that the land is chiefly valuable for the timber, and that the government is estopped proclaiming otherwise upon the trial but the objection was overruled and the exception allowed, whereupon witness answered, Yes, sir, I can give you a general idea. It is an open country with very little timber to speak of. It is a grass country." Whereupon the following question was asked, "What is the character of the whole of township 15-19, as to the timber? To which there was the same objection, ruling and exception. A. "What I saw of it, it does not amount to anything for the timber, I should think. That is what I saw of it."

Whereupon the witness was asked the question, "What was the character of the Biggs claim? To which the defendants objected on the ground that it referred to the claim of one of the defendants and not any person whom they were charged with conspiring to suborn, and it is incompetent and immaterial upon the ground that the indictment does not charge that there was any conspiracy to suborn perjury as to the character of the land, or the timber thereon, and because the indictment alleges that the land taken was chiefly valuable for its timber, but the objection was overruled and the defendants excepted, thereupon the witness answered, "Well, it
571 is open country, with some timber, a few trees, scrubby, nothing of any account." Q. For lumber, what would you call the grade of timber up there, the best of it?" Same objection, ruling and exception. A. I would call it very poor, coarse." Whereupon the witness was asked to make an estimate of the amount of timber on the J. N. Williamson claim, to which there was the same objection, ruling and exception, and the witness stated that he estimated the timber at 320,000 feet, and the witness over objection and exception, testified similarly in relation to a number of other claims taken by different applicants.

The following is all of the testimony of the aforesaid witness David Edgar introduced at the trial.

572 DAVID EDGAR, sworn on the part of the Government, testified as follows:

Direct examination.

By Mr. HENEY:

Q. Where do you live?
A. I live in Linton County.
Q. What is your business?

A. Well, farmer and cruiser, and different things.
Q. What experience have you had in timber cruising?
A. Well, I have cruised timber for the last fifteen or twenty years.
Q. What firm have you worked for?
A. I have worked for different firms; I could not name them all. In the east, Minnesota I have worked for Mitchell, McClure, Duncan & Brewer, and the Chapman Lumber Co. here, and the Eastern & Western Lumber Co., those firms.
Q. Whom are you working for at the present time?
A. Mr. C. E. S. Wood.
Q. Have you cruised portions of township- 15–19?
A. Yes, sir, I did about two months ago.
Q. Whom did you go there with?
A. I went there with Mr. Mitchell and Mr. Alpin.
Q. The photographer?
A. Yes.
Q. Was John Murray along?
A. Yes, sir, Mr. Murray was with us.
Q. You cruised also in township 15 S., range 18 E., did you?
A. Yes.
Q. I wish you would state in a general way the result of your cruising, of the Ernest Starr claim, the north-east quarter of section 24, 15 S., Range 18 E.

573 A. A general idea you mean?
Q. Yes, the general character of the claim and the timber on it.
A. Well, my notes here are very short, "This quarter of no account for timber."

Mr. BENNETT: I object to his reading from his notes.

Q. Did you make the notes at the time you were there?
A. I made them at the time; I just referred to my notes. Am I allowed to do that?
Q. Yes.

Mr. BENNETT: I don't object to his referring to the notes, but I object to his reading them.

Q. You can look at them and instead of reading the notes, counsel wants you to state, after looking at the notes.
A. All right.
Q. After looking at the memoranda can you tell us as to the general character of the N.E. ¼ of 24–15, 18 E.?
A. Yes.

Mr. BENNETT: This all goes in subject to our general objection, and further that it is alleged in the indictment that the parties took up the land for the timber, and it does not lie in the mouths of the prosecution to deny that, and put us on trial for something not charged in the indictment, and is incompetent and immaterial.

The COURT: Let that general objection apply to all this testimony, and it will be overruled.

Defendants except.

A. Yes, sir, I can give you a general idea. It is an open country with very little timber to speak of. It is a grass country.

Q. What is the character of it?

574 A. It is stony, the ridges are stony.

Q. What is the character of the whole township 15-19, as to timber?

A. What I saw of it, it does not amount to anything for the timber, I should think. That is what I saw of it.

Q. How much of it did you see?

A. I only saw those claims, section 24 in 15-19; I would have to look at my memorandum for that.

Q. 15-18?

A. 15-18 and 15-19.

Q. How did you get in there?

A. From Prineville; drove over to the Cadle Ranch.

Q. In getting in there from Prineville do you remember the road running along Veazie Creek?

A. Yes.

Q. Did you pass along there?

A. Yes, sir.

Q. From there how does it go to the shearing plant?

A. It runs right straight up the creek and kind of leaves it and gets on top.

Q. You ride through here (referring to the map)?

A. Yes, sir; just about there. The plant is in there somewhere.

Q. This section 24, in 15-18?

A. Yes.

Q. That is there?

A. Yes, sir.

Q. What other place did you go to?

A. I went in here; is that 20?

Q. Yes.

A. I was in there on section 20.

Q. The Biggs claim and the Williamson claim?

A. Yes, sir.

575 Q. In going there, how did you go to that?

A. Why, we went from the ranch to the township corner there, to the corner of 24, right in here; and we ran the line east a mile and got the corner of 18, 19, 20, and 21?

Q. 17-18?

A. 17-18, and 19-20.

Q. What was the character of the Biggs claim?

A. Well, it is open country, with some timber, a few trees, scrubby; nothing of any account.

Q. For lumber, what would you call the grade of the timber up there, the best of it?

A. I would call it very poor, coarse.

Q. Did you make an estimate of the amount of timber upon the Williamson claim?

A. Yes, sir.

Q. Give us your estimate of each quarter section separately, or of each quarter?

A. I will have to refer to my book for that.

Q. Yes, you may. Did you put it down in your book at the time of your estimating it?

A. Yes, sir; and never thought of it since. Section 18, 15 S., Range 19 E., the east half of the east half. Is that right?

Q. Yes.

A. 320,000, I think is what it figures.

(By JUROR:)

Q. Speak louder.

A. The east half of the east half of Section 18, township 15, south, range 19 E.

(By a JUROR:)

Q. How much timber?

Q. Give each forty separately?

576 A. Well, the southeast of the southeast, 125,000; the northeast of the southeast, 105,000; the southeast of the northeast, nothing; the northeast of the northeast, 90,000.

Q. Did you make an estimate of the timber upon the Marion R. Biggs claim?

A. Which is that?

Q. The west half of the northwest quarter and the west half of the southwest quarter, section 20, 15-19?

A. Yes, sir.

Q. Will you give us that by 40's?

A. Well, the northwest of the northwest, 45,000; the southwest of the northwest 15,000; the northwest of the southwest, 75,000; the southwest of the southwest, 130,000.

Q. Did you make an estimate of the timber upon Mrs. Sarah V. Williams- claim, which is the north half of the northeast quarter and the north half of the northwest quarter of 14-15-18?

A. Yes, sir.

Q. Give us the estimate of that by forties?

A. The northeast of the northeast, 75,000; the northwest of the northeast 50,000; the northeast of the northwest, 50,000; the northwest of the northwest, 75,000.

Q. Did you make an estimate and give it to us if you did, of the forties of the claim of Ernest Starr, being the northeast quarter of section 24-15 south, range 18 east?

A. Yes, sir. The northeast of the northeast, 75,000; the northwest of the northeast, 50,000, the southwest of the northeast, 35,000; the southeast of the northeast, 50,000.

Cross-examination.

By Mr. BENNETT:

Q. Mr. Edgar, the only part of this township, as I under-
577 stand you, that you claim to know anything about, is this quarter here, and this referring to the map?

A. That is right.

Q. This quarter here, and where was the Sarah V. Williamson quarter?

A. I don't know.

Q. You know where they are, don't you?

A. Yes, but I don't pretend to swear to that by name. There it is, I suppose, isn't it?

Q. Yes. That is all there is in this township that you claim to know anything about?

A. That is all that I have cruised.

Q. Do you claim to know anything about the balance of it?

A. No, that is only just the general idea.

Q. Have you been over the balance of it at all? of that township?

A. No sir; not any more than to drive through on the road.

Q. Have you driven clear through the township on the road?

A. No, I did not.

Q. Is there any road running through the township?

A. I think there is. There is a road running to the Cadle ranch.

Q. What do you mean by the Cadle Ranch, the shearing plant?

A. Yes, the shearing plant.

Q. That runs in through here, some place?

A. Yes, sir; but it goes on east.

Q. Did you go any farther east?

A. Nothing further than these lines.

Q. So you never went through this part of the township here at all?

A. No, sir.

578 Q. Who was Mr. Mitchell that was with you?

A. Why he is here I guess.

Q. Was he an agent of Mr. Woods up there?

A. No, sir; I don't think so, I don't know.

Q. What was he doing up there?

A. He went along with me to cruise the land with me.

Q. Or did you go along with him?

A. Well, I went along with him or he with me, just as you please; we went together.

Q. Is he a timber cruiser?

A. Yes, sir; I think so.

Q. Do you know whether he is or not?

A. I have known him to be such for years, for a number of years.

Q. Where did he live?

A. He lived here in Portland. My first knowledge of him was in Duluth, Minnesota.

Q. How long has he been out here in this country?

A. Well, he has been here two or three years, I suppose; I don't

know. I have seen him around here the last three years, I think, two or three or maybe four years.

Q. In the employ of the Government?

A. I don't know anything about his business. I think he was.

Q. Don't you know he was?

A. Well, I don't know.

Q. Don't you know he went up there in the employ of the Government?

A. Yes, I suppose he did, but I could not say for sure.

Q. What kind of a looking man is he?

A. A short stout fellow.

579 Q. Don't you know he is a detective or special agent for the Government?

A. Well, I understood that, but still I could not swear that he was.

Q. Where did you start from to go up there?

A. From Portland.

Q. Was Mr. Mitchell with you?

A. Yes.

Q. Who was this man, Murray?

A. J. T. Murray?

A. Yes.

Q. He is a timber cruiser here in town.

Q. Was he in the employ of the Government too?

A. He went along with me, yes, I suppose he was.

Q. Is he a special agent or detective for the Government?

A. Not that I know of.

Q. Employed by the Government on that trip?

A. I don't know anything about it; he went the same as I did.

Q. Did you go up there and cruise that for Mr. Wood? You said you were in the employ of Mr. Wood.

A. Yes, sir; I was.

Q. You were not in Mr. Wood's employ then?

A. No, sir; I did not go to cruise the land for Mr. Woods.

Q. How long have you been in Mr. Woods' employ?

A. I worked last year for him sixty or seventy days, and this year I have worked a couple or three months.

Q. For the last two months?

A. The last two months, yes.

580 Q. For the last two months you have been working for Mr. Woods?

A. Yes.

Q. All the time?

A. Yes; that is, since I came off of this cruising job over here that is in question.

Mr. HENEY: He went up there for us.

A. I went up for these people here.

Q. You did not go up there for Mr. Wood?

A. No, sir.

Q. You went up for the Government?

A. I went up for the Government, I suppose, yes.

Q. To prepare yourself to be a witness in this case?
A. No, I never figured on being a witness.
Q. What did you understand you were going up there for?
A. I was going up there I suppose, to cruise that timber.
Q. What do you suppose the Government wanted you to cruise that timber for if they were not going to make you a witness?
A. I don't know; I am hired often.
Q. You don't know; you haven't any idea about it?
A. Well, I supposed there might be such a thing as I would be a witness.
Q. Are you getting any more than your witness fees for going up there?
A. Yes, sir; they paid me to go up, paid me wages.
Q. Paid you wages?
A. Yes.
Q. What wages?
A. Paid me seven dollars a day.
Q. And expenses?
A. Yes, or agreed to; I haven't got the money yet.
581 Q. How long were you gone?
A. About four or five days, I forget now. I don't believe I have got a memorandum of the time. We left here on the 21st I think. I think it was four or five days, but I would not be sure.
Q. Went from Portland?
A. Yes.
Q. Went up to Shaniko on the railroad?
A. Yes.
Q. That took you one day?
A. Yes. And we took the stage that night at Shaniko and we rode all that night and the next day we got to Prineville. I forget just exactly the time, about eleven o'clock I should judge. We had dinner and then went right on to the Cadle Ranch the next day.
Q. The same day you got to Prineville?
A. The same day, yes sir.
Q. What time did you get to the Cadle Ranch?
A. In the evening, but I don't remember exactly; five or six o'clock somewhere along there; four o'clock I guess; earlier than that, probably, it was in the afternoon, I remember that very well.
Q. How long did you stay at the Cadle Ranch?
A. We were there about two days I think.
Q. You stayed there the next two days?
A. We got there that night and the next morning we went on the land.
Q. You stayed there two days?
A. We worked the next morning and we got the location that evening and the section corner; and the next morning we worked, and we worked that afternoon and the next day and the next day. That would be two days that we were on the land.
582 Q. When did you leave to go back to Prineville?
A. We left the following day.
Q. You were there two entire days?

A. We were there, yes sir, we worked two days on the land and the next day we left there and the day we left there, we looked over a quarter section in 24. The team met us on the road. We looked at the land, because the road runs right through this quarter section.

Q. Did you get back to Prineville that day?

A. We came back to Prineville that day.

Q. At what time did you get to Prineville?

A. We go- to Prineville along about—I forget whether it was forenoon or afternoon; I could not say exactly what time it was, whether before dinner or after.

Q. Did you leave Prineville that day, going back, or did you stay there all night?

A. No, we left that same day.

Q. And came back to Shaniko that night.

A. We were on the road; no, we did not get to Shaniko that night, because we were on the road half a day and a night, you might say, pretty near.

Q. A day and a night?

A. Well, not exactly. We got to Shaniko in the morning, I remember that very well; we started at night and got to Shaniko in the morning. In the afternoon we left Prineville and got to Shaniko the next morning.

Q. Drove all night?

A. Yes, sir.

Q. The next day you came down?

583 A. Yes, sir.

Q. Then you were gone six days?

A. Well, I never made a note of how long it was; never paid much attention to it.

Q. And you claim of that time, you spent two days on the land?

A. Yes, sir; I think we did.

Q. How many section corners did you find up there?

A. We found four corners, I think.

Q. What section corners were they that you found?

A. We found the southwest corner of section 18, found the town line.

Q. What else?

A. That would be the four corners, there are four section corners there, but this is the land in question.

Q. There are four section corners?

A. There are four section corners there.

Q. And one section corner?

A. That is all.

Q. What else did you find?

A. Then we found the southwest corner of section 18.

Q. Well, what else?

A. We found the southwest corner of section 20.

Q. Anything else?

A. Nothing that I know of.

Q. You didn't find any other corner?

A. Well, did I give you 24?

Q. What say?
A. Did I give you 24?
Q. No.
584 A. The northeast corner of section 24.
Q. You found the northeast corner of section 24, did you?
A. Yes, sir.
Q. Is that all?
A. That is all I know of.

Whereupon a recess was taken until 2 o'clock this afternoon, September 16th.

585 Q. Now, Mr. Edgar, you say you found the southwest corner of section 18?
A. Yes, sir.
Q. What kind of a corner did you find for that?
A. It is one bearing tree that stands on a knoll. I think there is a stone for the corner, and one bearing tree.
Q. Did you find the stone?
A. I think so; I am pretty sure we did. (Examines book.) Yes, sir.
Q. What kind of a stone was it?
A. A stone about 18 inches long.
Q. Setting in the ground or loose?
A. Laid on the ground; I don't remember as it was stock in the ground.
Q. Laid on the ground?
A. It laid on the ground, I think, yes, about 10 by 10.
Q. What section was it on?
A. You mean the stone?
Q. No, the bearing tree?
A. Section 19.
Q. Does that show the location of that corner (showing photograph). You need not read what is at the bottom, but tell from the picture.
A. Well, we took so many pictnres there, I saw lots of them; it is pretty hard to describe. I can't tell from a glance, because photographs——
Q. I would like to have you not look at the bottom, what is written on there, but testify from your own knowledge, not from what somebody has written at the bottom.
A. I think it does, but I would not be sure about that. It is hard to recognize a picture you know.
586 Q. It is hard to recognize a picture?
A. Yes, for me.
Q. Even though you took it yourself?
A. Yes, where there are so many pictures.

Mr. HENRY: What is the number of that photograph?
Mr. BENNETT: No. 7.

Q. Can you find the bearing tree, the one that you claim to be the bearing tree?

A. On that picture?
Q. Yes?
A. I don't know whether I can or not. I have got notes for everything here. What did you say the number of the photograph is?
Q. The photograph is No. 7.
A. No. 7. Well, yes, here it is, right here, showing the corner- of 17, 18, 19 and 20.
Q. Then when you referred to your notes and the number of the picture you can tell that that is the picture of that corner, can you?
A. Well, I would not know any more about the picture now; I have just got the notes.
Q. Can't you find the bearing tree now?
A. The corner stone shows plain; I remember that very well.
Q. Where is that?
A. This is the stone right there (indicating on the photograph).
Q. That is the stone is it?
A. Yes, that is the stone.
Q. You are sure of that, are you?
A. Yes, sir, quite sure. Now, let me see again. The bearing tree faces that; I think that is the bearing tree, but I could not
587 say for sure; but I know the stone.
Q. You think this is the bearing tree here?
A. Turn it around this way.
Q. Well, I want the jury to see it. If Mr. Heney does not object, you can put a little pencil cross mark on what you think is the bearing tree there.

Mr. Heney: I haven't any objection.

A. I think that is the tree.
Q. Put a little cross mark on the tree.
A. I think that is the tree (marking it).
Q. That is on section 19, is it?
A. Yes, I think it is.
Q. Then this picture was taken looking from the corner south down onto 19 and 20, was it?
A. (Examining book), 17, 18, 19, and 20, yes.
Q. What say? Can't you tell from the picture?
A. I am trying to collect this thing so as to get it right, to remember it. I thought that picture was looking East.
Q. Looking directly east?
A. Nearly so I should say.
Q. Would that carry you onto section 19?
A. I think so, yes.
Q. You could not be looking east from the section corner and have the bearing tree on section 19, where you have located it could you?
A. Yes, you can I think.
Q. Doesn't the line between section 19 and 20 run right south from the corner?
A. Yes, the lines run both ways there.

Q. But the line between 19 and 20 runs south from that corner doesn't it?

588 A. Wait until I get my map and I will see; that may be a mistake.

Q. You are a timber cruiser? Can't you tell?

A. Yes, sir. But I want to make sure of those things.

Q. Have you any trouble about getting lost in the woods?

A. No, I have got it now in my head all right.

Q. Well, tell us how it was then?

A. We were looking west when we took the photograph.

Q. You were looking west?

A. Yes.

Q. Then this picture is looking west?

A. Well, nearly so; I don't know as it was directly west; I didn't pay much attention to that; but nearly so.

Q. In what direction then is the bearing tree from what you claim to be the corner stone?

A. I have the minutes of it here (examining book).

Q. Well, without looking at the minutes, but from the picture?

A. I won't say.

Q. You can't tell from the picture?

A. I don't know, no, not exactly.

Q. You haven't it surveyed out in your mind then. Are you still lost?

A. I didn't pay much attention to those things, how they stood. I don't want to make a mistake.

Q. What direction is the bearing tree from the corner stone?

A. Well I think it is a westerly course.

Q. You thought you could tell from your notes?

A. Well, I haven't got it on the notes here. I thought I did but I didn't have it.

Q. Is it north or south of west from the corner stone; north or south of due west?

589 A. Well, the trees are very nearly on a line I should say; the tree, if I remember right, was very nearly on the line.

Q. Very nearly due west?

A. Very nearly, if I remember right; but I would not say. Sometimes the corner tree is right opposite, in the opposite section from where it is numbered.

Q. From what?

A. From where it is numbered.

Q. From where it calls for.

A. Yes, sir, often, very often, a bearing tree will, for instance call for section 18 and be in 19.

Q. What say?

A. A bearing tree will call for section 18 and be in 19; be located in section 19 when you are on the line.

Q. Do you mean that a bearing tree may be almost due on the line?

A. Yes; I could not say one way or the other, but it seems to me that is nearly on the line.

Q. Nearly on the line due west from the corner?
A. Yes, nearly so I should say.
Q. Now, you say you found the southeast corner of section 18?
A. The southeast corner?
Q. You say you found the southwest corner of section 18?
A. Yes, sir.
Q. How was that marked?
A. That has one bearing tree and a stone for the corner on the town line.
Q. Did you take a picture of that bearing tree?
A. I don't remember whether we did or not.
Q. Is there a corner stone there?
A. I think there is, yes.
590 Q. What kind of a stone there?
A. Well, that is the stone, about 18 inches long, ten by ten.
Q. Just the same as the other?
A. I think I made a mistake on the other; I think I read southeast for the southwest. I think I made a mistake on the reading of the other. I see now this is the southwest corner of 18 that I had reference to all the time on the town line.
Q. Then you think this picture I showed you that you recognized was a picture of the southwest corner instead of the southeast corner?
A. I could not say much about the picture. I recognized the pictures, but I couldn't say where they are; I didn't pay enough attention to them.
Q. Then the corner stone and bearing tree you marked, that you thought you recognized, was at the southeast corner?
A. That is the southeast corner that you have there?
Q. It is the southeast corner.
A. Yes sir.
Q. The southeast corner of what section?
A. The southeast corner of section 18.
Q. This stone you have described was in the southwest corner was it?
A. This stone you have got there?
Q. Yes.
A. Yes, that is the stone I have reference to now.
Q. You described one a while ago for the southeast corner?
A. This is the southeast corner proper that you have got there.
Q. This is the southeast corner?
A. Yes.
Q. When you said it was stone 18 inches you didn't mean that for the southeast corner?
591 A. Well, here it is, I made a note of it; "stone 18 inches long, ten by ten, upon a tree ten inches in diameter."
Q. What corner is this?
A. This is the southeast corner of 18.
Q. The southeast corner of what?
A. Of section 18.
Q. How was the southwest corner of 18 marked?

A. The southwest corner has one bearing tree and it is a pine. A pine tree and a stone for the corner too.

Q. What kind of a stone for the corner? The southwest corner now, mind you?

A. I know, yes.

Q. Of section 18?

A. It is a stone about 18 inches long, I think, if I remember right.

Q. Just the same length as the other one?

A. I got them notes mixed.

Q. What say?

A. I got my notes mixed and I have made a mistake on it, I see plainly.

Q. Got them mixed up so you can't tell anything about it?

A. I can now, because that 18 was southeast, and southwest on the notes, but I read it wrong.

Q. Which one of the corners is it that had a stone 18 inches long?

A. Well, that is the southwest corner of section 18.

Q. Then what kind of a mark has the southeast corner of section 18?

A. Well, section 18 east has a bearing tree, a pine, 24 inches in diameter and a stone, about 24 feet northeast from the corner, about 24 inches in diameter.

Q. About 24 inches in diameter.

592 A. Yes. I should say about that is what the notes read; it says a stone corner; does not say the size.

Q. What say?

A. My notes don't say what the southwest was.

Q. Which is it your notes don't say? The southeast or southwest?

A. At 17, 18, 19 and 20 the bearing tree is pine, I understand.

Q. Well, all the trees out there are pine, aren't they?

A. Well, I know, but about 24 feet northeast from the corner——

Q. What is that is 24 feet northeast from the corner?

A. Why, the bearing tree, a pine 24 inches in diameter about 24 feet northeast from the corner stone.

Q. The bearing tree is 24 feet northeast?

A. About 24 feet northeast from the corner.

Q. Now that is at the southeast corner of section 18, is it?

A. Of 17, 18, 19 and 20, yes.

Q. Then this bearing tree you have talked about would not be almost on a line west of the corner as you testified a while ago?

A. Well, I don't know; it might be.

Q. I thought you said just now it is northeast of the corner?

A. It says that on the southeast corner, yes.

Q. Then it would not be on a line west?

A. Well, it isn't on the line west, I don't know as it is exactly.

Q. If it is on a line west it couldn't be 24 feet northeast?

A. Well I took these minutes at a guess; didn't pay much attention.

Q. Well you could not have made such a discrepancy as that, even in a guess, could you?

A. No.

Q. Is your guess on the amount of timber as far off as your guesses on this proposition?

593 A. I don't know; pretty hard to tell that.

Q. You claim to have found the southwest corner of section twenty, do you?

A. Sir?

Q. You claim to have found the southwest corner of 20?

A. The southwest corner of 20?

Q. The southwest corner of section 20?

A. Yes, sir, I think we did; pretty sure we did. (After examining book.) Yes, sir.

Q. How was that marked?

A. There is a bearing tree there and a creek if I remember right.

Q. A bearing tree and what?

A. Bearing tree and a creek; water runs right close to it.

Q. What was there?

A. It was a bearing tree 24 inches, stands 33 feet south southeast of the corner stone, and a creek about 5 feet west of the corner.

Q. Did you find a corner stone down there?

A. Yes.

Q. You did?

A. I think so, yes, sir.

Q. Are these notes you have notes of what you found on the ground or notes you took from the government surveys as to the points indicated by the field notes?

A. These are the notes I took on the ground.

Q. You found a stone there, did you?

A. Yes, sir.

Q. What kind of a stone?

A. Well, it is a stone—it says bearing tree 24 inches, stands 33 feet south southeast of corner stone, and creek about 5 feet west of the corner. I didn't make a note of what the stone look-like at all; it says "stone."

594 Q. You don't remember what it looked like?

A. Well, no, I don't really. I know the stone is there and I remember the creek very well.

Q. On which side of the creek is that stone you talk about?

A. It is on the east side.

Q. Of the creek?

A. I think so, yes.

Q. You say you found the northeast corner of 24, did you?

A. The northeast corner of section 24?

Q. Yes.

A. Yes, sir.

Q. Where was it?

A. Well, that is the southwest of 18 and 24, which are together you know; it is the same corner.

Q. What did you find there?

A. There is a stone there.

Q. What kind of a stone?

A. I have got the notes here I guess; the same as I told you before.

Q. You never told me before, anything about that one.

A. Well, that is that stone marked 24 inches in diameter and a pine tree 24 inches in diameter.

Q. Is that at the northeast corner of section 24?

A. Yes, sir, the same as 18 was.

Q. Then that is the same corner you have testified about, the southwest of 18?

A. The southwest corner of 18.

Q. Then you only found three corner stones?

A. Three corner stones.

Q. Yes.

A. We found another corner 7 and 12, and 13–18. We
595 found that corner also. That would be the northwest corner of 18.

Q. You haven't told us about that yet?

A. Well, it didn't belong to the land in question; that is the reason I didn't mention it; but we went there to get out bearings on 24.

Q. You found a corner there?

A. Yes.

Q. What kind of a corner was it?

A. Well, I did not make any note of that, but I remember the corner well.

Q. Now, in reference to the Biggs' claim and in reference to all this claim, what kind of timber is there in that country?

A. Well, I don't know one claim from another by the names of them. Do you mean in general?

Q. I mean whether pine oak or fir or cedar or tamarack or what?

A. Pine.

Q. Exclusively pine, is it?

A. Nearly so.

Q. What else?

A. Oh, there is a little juniper and salal and all kind of rubbish.

Q. Any oak?

A. Well, I didn't notice any oak in particular, nothing of any account.

Q. Did you notice any oak there?

A. There may be some and there may not; I didn't pay any attention to it; don't think any of any value.

Q. Do you know whether there is any oak there or not?

A. I didn't pay any attention to it. There might be a few oak brush.

Q. What say?

A. There might be a few small oak trees there.

596 Q. Isn't there some big oak trees there?

A. Nothing to amount to anything, nothing of any value.

Q. You think there was some trees of oak, but not of any value?

A. Well I should say yes, of no value whatever.

Q. Isn't it true now that there isn't any oak in that country or within a hundred miles of there?

A. I don't know, there might be: I say I don't know.

Q. Is there any fir there?

A. No, sir, nothing to speak of.

Q. Is there any at all?

A. I never seen any.

Q. You didn't see any fir?

A. No, sir, nothing to amount to anything. Might be a tree or two, scattering here or there, but I didn't take note of it.

Q. Did you see any at all?

A. I don't remember as I did.

Q. If you were cruising for timber and saw any fir there you would remember that wouldn't you?

A. Yes, of course, but I cruised it probably different from what you understand.

Q. There is a difference between fir and its value for lumber purposes, and pine, is there not?

A. There is a difference between them?

Q. Yes.

A. I should say so, yes.

Q. Isn't it a fact that on the north end of the Biggs' claim there is a fine bit of fir timber?

A. Which is the Biggs' claim?

Q. Don't you know where the Biggs' claim is?

A. I don't know any difference in the names.

Q. Wasn't that pointed out to you?

A. I heard the names, but I never paid any attention to
597 which belonged to which.

Q. Didn't you testify on your direct examination about the Biggs' claim?

A. Well, you called the quarter, a certain quarter section. I don't know whether it is the Biggs' claim or whose it is.

Q. Didn't you describe it as the Biggs' claim at one time in your examination?

A. Here?

Q. Didn't you describe the west half of the west half of section 20 as the Biggs' claim, at one time?

A. Well, I couldn't say as it is the Biggs' claim; I don't know. I just described it as the west half of the west half.

Q. Isn't it true that on the north end of the west half of the west half of section 20, on the northwest quarter of the northwest quarter of section 20, there is a fine body of fir timber?

A. No, sir.

Q. There is no fir timber there, isn't there?

A. Not to speak of, not of any value.

Q. You are as sure of that as anything else you have testified to, are you? There is no fir timber to speak of anywhere around the southeast corner of section 18, is there?

A. Well, now, there might be a tree or two; I didn't pay much attention to that.

Q. Just a tree or two?
A. Just a little, I admit that.
Q. Which way is it from that corner, if there is any?
A. I don't know as there is any. It is a pine country.
Q. Mr. Edgar, did you take this up tree by tree to make your estimate?
A. No, sir.
Q. How did you estimate the timber?
598 A. I tried to count the trees as near as I can and get an average, average size and average to the acre as near as I can.
Q. How much lumber is there in a tree two feet through and 30 feet to the first limb; good merchantable tree 30 feet up and 2 feet through at the butt and 20 inches at 30 feet high?
A. Do you have only two logs then? How many logs do you figure on?
Q. Well that is two 15 foot logs, isn't it.
A. There are no 15 feet logs that I ever saw.
Q. What say?
A. There are no 15 feet logs I ever saw.
Q. You couldn't figure it that way then?
A. No; could figure it 16 feet.
Q. Well figure it 16 feet then, if you can't figure a 15 foot log. I suppose if you found a tree that would not make a 16 foot log you wouldn't figure that at all?
A. Well, I would figure it some way, I would call it two 12s.
Q. Well, as that seems to be the only way you can figure——
A. Well, there isn't any rule that will give you a 15 ft. log.
Q. Well, take a 16 foot log then, two 16 ft. logs.
A. How big at the butt?
Q. 24 inches at the butt and 20 inches at 32 feet high.
A. Say 24 inches and make it easy figuring.
Q. Well I am not trying to make it easy for you.
A. About 300 feet in a log.
Q. About 300 feet in the two logs?
A. No, in one log.
Q. Well I am asking you two logs, thirty-two feet. You seem to want to figure a 16 foot log.
A. You mean a 20 inch log.
Q. I say 24 inches at the butt and 20 inches 32 feet from the butt?
599 A. Well there is about 500 feet in the stick.
Q. In the two logs?
A. Yes, about that, or 600. Here it is; I have got the rule right here.
Q. Would it be 500 or 600?
A. It would be 275 feet in each log.
Q. You had to look at your rule to tell?
A. Well I am sure of it by that; I could tell nearly.
Q. What is the business of a timber cruiser, Mr. Edgar; you say you are a timber cruiser by profession. What is your business, or the business of a cruiser?

A. His business is to go out when he is employed, to estimate timber and give a description of it.

Q. Go out and find timber worth locating. Is that his business?

A. Well, no; it is according to who has employed him or in what way.

Q. Is that the principal part of his business?

A. His business is to go out and estimate the amount of timber on a piece of land.

Q. For the purpose of location?

A. No, sir, I never did that business.

Q. You never did that business at all?

A. No.

Q. These lumber companies you were employed by never sent you out to figure on whether timber was worth locating scrip on?

A. No, they never have yet.

Q. Nor whether it was worth locating upon in any way?

A. No, I never located any vacant lands or any government lands for any lumberman in my life.

Q. How much experience have you had in cruising?

A. I have had about twenty years.

600 Q. Whereabouts?

A. Michigan and Minnesota generally, and Washington and Oregon; principally in Minnesota.

Q. You never cruised any government land?

A. I have never gone on government land for any lumber company in my life.

Q. You never cruised any government land?

A. I suppose I have at times, but I didn't know it.

Q. You never cruised any government land intentionally when you knew it?

A. Unless I was employed. You hire me to go out onto a piece of land, I don't ask any questions; I go and look it over; I don't care who it belongs to. I don't know whether it is Government land or not; don't pay any attention to it.

Q. So you don't know whether you have cruised Government land or not?

A. I say I can't tell; I don't know as I ever did.

Redirect examination:

Q. I don't know whether you stated or not; did you find the northeast corner of section 13?

A. Yes.

Q. Did you find the northeast corner of section 13?

A. Yes sir.

Q. Starting from that did you find the northeast corner of section 14?

A. The northeast of 14?

Q. Yes.

A. No—let me see——

Q. Did you find that in any way?

A. Yes, oh, yes, sure, we went west and found that corner; ran right on the line.

601 Q. Did you see Mr. Graves and Mr. Gesner up there?

A. No, sir, not that I know of. The northeast of section 14 I remember very distinctly; there is a juniper tree for a witness tree.

Q. As a witness tree?

A. Yes, sir.

Q. Are the objects in a photograph reversed, do you know?

A. Sir?

Q. Do you know whether or not objects reproduced in a photograph stand in the photograph reversed?

A. No, I never paid any attention to it. Never have thought anything about it at all; they may be reversed for all I know.

Q. What is an average of a good timber claim in this state? What would you consider an average good claim?

A. Fir or pine?

Q. Pine.

Objected to as calling for a conclusion.

Overruled.

The COURT: It might be well to confine it to that vicinity.

Q. Do you know anything about the timber in that vicinity?

A. Directly west of there I have been cruising; just came from west of there in a pine country.

Q. How far west?

A. In 13–9 and 14 and 15.

Q. What is an average good claim?

Objected to.

The COURT: Where is that?

Mr. BENNETT: It is a long ways from this land.

The WITNESS: It is in 13–9 and 10.

Mr. HENEY: That is in that immediate vicinity.

Mr. BENNETT: It is 50 miles from there.

602 Q. How far is it from Prineville to this place you are talking about now?

A. I should say it was thirty miles.

Q. How far is this place from Prineville?

A. That is about 20 miles.

Mr. HENEY: It seems to me that is sufficiently in the section.

Mr. BENNETT: I would like to ask a question.

Q. It is 30 miles in the other direction?

A. Well, Prineville is north; it is a kind of a triamble each way.

Q. Prineville is pretty near between the two isn't it?

A. Nearly so I should think; I wouldn't say for sure, only from a guess.

Q. In an entirely different belt?

A. It is the same class of country you know.

Mr. HENEY: How is the road from Prineville there as compared with the road to this place for hauling lumber?

A. In what way do you mean?

Q. For hauling lumber to Prineville, what is the character of the country from the place you are speaking of, as compared with this place?

A. Oh, it is a pretty hard country to haul lumber in.

Q. Worse than this?

A. Well, something of the same character, although it is not as mountainous as this is here.

Q. No, I mean, is it worse than the Horse Heaven country?

A. It is about the same kind of country I should say from all I know about either of them.

Mr. HENEY: The only purpose of the question is to get a comparison as to the Prineville market.

Mr. BENNETT: I would like to ask a question or two more before the ruling.

603 Q. Is not this timber you are talking about on the Des Chutes river?

A. No, sir.

Q. In the vicinity of the Des Chutes river?

A. No, sir.

Q. Where is it?

A. It is in the Cascades; I think it trends towards the Santiam and to the Mackenzie.

Q. That is more than 30 miles from Prineville, isn't it?

A. These headwaters that I am speaking about I think trend—I think the trend of the country I have been cruising lately—it is up on the divide.

Q. Well, the timber is more than 30 miles from Prineville, on the head of the Santiam?

A. Well, I should say in the neighborhood of 30 to 35 miles.

Q. Isn't it 30 miles from Prineville to the Des Chutes river?

A. Yes, sir, but you go one way to the Des Chutes and you go the other way to where I was; right opposite almost. You go south to the Des Chutes and go west to where I was, to this land, I am speaking about.

Q. It is on the west slope of the Cascade Mountains?

A. It is right on the divide, you might say right on top.

Q. Of the Cascade Mountains?

A. Yes, sir, east if anything; it slopes to the east and south; just over the divide where I speak about now.

Q. Is the Des Chutes river between you and Prineville?

A. I think the Des Chutes is south.

Q. Do you have to cross the Des Chutes river to get from where you were to Prineville?

A. I don't think so. I never went through that way, but I don't think it. You might cross it or ford it or something.

Q. Where are you from Bend?

604 A. I don't know where Bend is; never paid any attention; I know there is a place of that name and that is all I know about it.

Q. Now, isn't it a fact that the place where you are speaking of is 60 or 70 miles west of Prineville?

A. Well, I will tell you *know*. In 15–9 I think they claim it is 32 or 33 miles from Sisters, in that neighborhood, to Prineville; and I was four miles west of Sisters.

Q. They claim it is how far to Prineville?

A. 30 to 35 miles, somewhere in that neighborhood; I don't know.

Mr. HENEY: Do you mean Range 9?

A. Yes.

Mr. HENEY: It couldn't be over 72 miles from this place, so it would not be over half that, any way you figure it?

Q. A township is six miles isn't it?

A. Yes, but you are in a different range I think.

Q. I thought you were in this range?

A. No, I think not.

Q. What range are you in?

A. I think it was 15 south range 9 east.

Mr. BENNETT: That is just 60 miles from this land isn't it?

A. Sir?

Q. It is just 60 miles from 15–9 to 15–18, isn't it?

Mr. HENEY: Yes, 60 miles.

The WITNESS: I go by the stage road?

Q. It is a good deal further by the stage road?

A. Well, they say from Sisters, the Post Office, they call it 30 some miles from there to Prineville.

Q. And you were how far west of Sisters?

A. We were west of there I should say three to four miles.

Q. Then you are forty miles in one direction from Prineville and about 20 miles in another direction to these claims, making it sixty miles.

A. You can figure it up on the map.

Excused.

605 Thereupon the Government called one JOHN C. MURRAY and WILLIAM MITCHELL who testified subject to the same objections and exceptions along the same line as the witness Edgar and giving this testimony the witness referred to the photographs hereinbefore mentioned. Said witness Mitchell having testified in his direct examination that he was an assistant special agent of the General Land Office and had occupied that position for about two months, on cross examination was asked the following questions: "Q. How long have you been an assistant special agent? A. A little over two months. Q. What has been your duties during that time? A. Why any work they put me at. Q. What work did they put you at? A. They put me at a hundred different jobs. Q. A hundred different jobs in two months? A. Well, I wouldn't say a hundred,

but they put me at a good many different jobs. Whatever they wanted me to do, I would do. Q. Well, what was it? Give the general—it is only a short time? A. What is the question? Q. What have you been doing? A. Well, I have been looking timber, and watching around seeing these fellows tampering with the witnesses, and such as that. Q. Watching around to see if there wasn't any one tampering with the witnesses, eh? A. Watching them tamper with the witnesses. Q. Following them around? A. Well, not exactly. Q. Watching them tampering with the witnesses, eh? A. Yes, sir. Q. Following them around? A. Some times. Q. Now, how much of the time for the last two months have you been following people around to see whether they tampered with the witnesses or not? A. I didn't say that I was following them around to see them tamper. I say I have seen them tamper." Whereupon the witness was cross examined at considerable length as to how he claimed to have seen anyone tampering with government witnesses, and he testified in substance that he had seen Mr.
606 Biggs and Mr. Gesner talking with the witness by the name of Foster subpœnaed by the Government but that he could not hear the talk, but that Foster afterwards was not very friendly with the Government, and that he had seen a witness by the name of Parkey go up to the room of the attorneys for the defendants at the Imperial Hotel with Dr. Gesner and had seen him talking with the witness by the name of Charlie Graves, and had seen the defendant Biggs talking with the witness Miss Vanderpool on the way to the Oaks and at different places, but he did not hear what she said, but that she had not been friendly to the Government since, and would not as witness said swear to what she knew, but the witness had not been asked about any conversation between Dr. Gesner and James D. Cooper, hereinafter referred to. Whereupon said witness on re-redirect examination was asked the following question, "On July 10th, that being during the first trial at 9:30, in the morning, at the Imperial Hotel, did you hear Dr. Gesner say anything in regard to the witness to James D. Cooper?" A. Yes sir." Q. What did you hear him say?" (here witness was asked by counsel for the defendant, "Q. Mr. Cooper was not a government witness?" Witness answered, "Not that I know of.") Whereupon counsel for defendant objected to the question "What did you hear him say?" as not proper redirect examination, and incompetent immaterial and hearsay but the objection was overruled and the defendants excepted thereto, whereupon the witness answered as follows, "Dr. Gesner came into the hotel and Mr. Cooper said, "Hello Doc, how is things getting along up there? Those fellows don't seem to be wanting to tell all they know." Doc says, "Oh, we are getting along pretty well" He says, "They won't; they dasn't tell all they know; they know which side their bread is buttered on."

The following is all of the testimony of the aforesaid witness John C. Murray introduced at the trial and all of the testimony of the aforesaid witness William Mitchell.

607 JOHN C. MURRAY, sworn on part of the government, testified as follows:

Direct examination.

By Mr. HENEY:

Q. Mr. Murray, you were employed by the government to go up to cruise timber, near Prineville, were you?
A. I was.
Q. How long have you been in the business of cruising timber?
A. About 30 years, between 29 and 30.
Q. Where have you done it?
A. In Minnesota, some in Wisconsin and the rest in Oregon, Washington, California and up in the British possessions.
Q. How long have you been in Washington and Oregon?
A. Seventeen years in Oregon.
Q. Been in the business of cruising all that time?
A. All that time, yes.
Q. For whom are you working now?
A. I have been working for the road company. C. E. S. Woods is the attorney.
Q. Did you cruise the northeast quarter of section 24, township 15, south, range 18 east.
A. I did.
Q. Can you state the general character of that quarter section and the timber upon it, that is the Ernest D. Starr claim.
A. The east side of the quarter section is level; and has fir timber on it and covered with grass. Very good grazing land. The west side runs up into the hills, stony, very rocky and very scrubby timber.
Q. Did you make an estimate of each quarter?
A. I did.
Q. Please state each 40 separately.
608 A. I have notes.
Q. Yes, you can refer to your notes.
A. The northeast of the northeast of section 24, 15 south, range 18 east, 60,000 feet on that quarter. The northwest of the northeast, 35,000 feet. The southwest of the northeast, 60,000 feet and the southeast of the northeast, 50,000 feet.
Q. Did you cruise in north half of the northeast quarter and north half of the northwest quarter of section 14-15-18?
A. I did.
Q. State the general character of that?
A. Well the wagon road runs right through it; it is quite level through the south and the central part of this north half. The north part of this particular quarter lies up in the hills; good grazing land, especially near the creek. The creek runs right by the wagon road. The north side of the road runs up in the hills. Nothing on it merchantable. Along the road there is some little timber that could be sawed up and made into lumber of the very poorest class.
Q. Did you make an estimate of each 40, if so, give it?
A. The northeast of the northeast of 14-15-18, I estimated at

100,000 feet; the next 40 west of it, the northwest of the northeast 25,000 feet; the northeast of the northwest 75,000 feet and the northwest of the northwest 75,000 feet.

Q. Did you cruise the west half of the northwest quarter and the west half of the southwest quarter of section 20-15-19 east?

A. Yes, sir.

Q. State the general character of that? That is the Biggs claim.

A. The general character of it is very similar to the other. It is scrub timber; the creek runs down through the two south forties or the west half of the southwest: the creek flows through two forties, and it is good grazing land where there is enough

609 timber to shade the ground so the grass can grow.

Q. Give us an estimate of each forty.

A. The northwest of the northwest of section 20, 15 south, range 19 east I estimate at 58,000 feet; the southwest of the northwest of the same section 21,000 feet; the northwest of the southwest, 60,000 feet; and the southwest of the southwest, 98,000 feet.

Q. Did you cruise the east half of the northeast quarter and the east half of the southeast quarter of section 18, township 15, range 19 east?

A. I did.

Q. What was the general character of that?

A. Very similar to the others. Some of it good grazing land and some timber on it. The southeast 40 had some fir timber on it.

Q. And a meadow?

A. There is a meadow fenced in on one forty. The northeast of the southeast about ten acres.

Q. Any water on it?

A. Yes, sir; about ten acres of meadow fenced in and water running through it; a creek rises in that forty or right on the line between the two forties and flows to the northwest.

Q. Did you estimate each forty on that claim and if so, state what you estimated it at.

A. I did.

Q. The southeast of the southeast of section 18, township 9, range 19 east, I estimated at 132,000; the next forty north, the northeast of the southeast 95,000 feet; the southeast of the northeast did not have a pine tree on it that was fit for lumber; the northeast of the northeast I found 70,000 feet on it.

610 Q. Did you cruise any other part of that township?

A. I did not.

Q. Did you get a view of any other part of the township from any point you were on while you were cruising?

A. From about the central part of the Biggs' claim we could see about all of the same section looking to the east and southeast about all of section 20.

Q. How was the balance of the section timbered from what you could see?

A. It was very similar to what we could see; it was scattered pine timber, very limited, and so scrubby that you could hang your hat on many limbs of the trees.

Q. Were you at any point during that trip where you got a view of the township generally?

A. No, I was not. Not where I could get a view of the township in general.

Q. Or any considerable portion of it?

A. No, sir, not more than half a mile or three-quarters of a mile away.

Q. You drove out there from Prineville did you, along the road?

A. Yes.

Cross-examination.

Questions by Mr. BENNETT:

—. Whereabouts have you been engaged in cruising, Mr. Murray?

A. Recently?

Q. Yes.

A. Well, how recently do you have reference to. The last thirty days or ninety days?

Q. No, before you went out there; say in the last ten years.

A. I lived in Portland and have cruised all over the coun-
611 try; California, Oregon, Washington and the British possessions; some in Nevada and Idaho.

Q. What cruising have you done in Oregon?

A. Nearly all over the entire state.

Q. Did you cruise any in eastern Oregon before this?

A. I have, for seventeen years in Oregon.

Q. I say, in eastern Oregon?

A. Four years ago was when I first commenced to cruise in Eastern Oregon. I have been there every year since; have been all over the Des Chutes, in the Lake View, Silver Lake, up there past Burns, all over the Blue Mountains.

Q. Who were you cruising for?

A. Eastern parties generally. Part of the time for myself. Part of the time I was locating land and part of the time I was working independent.

Q. Parties who were locating government lands?

A. Part of the time, yes, sir.

Q. What companies were you cruising for?

A. When I was locating government lands I was not cruising for anybody. I was doing it for myself, for my own business.

Q. You were not in the employ of any company?

A. Not at that time, no, sir. Not when I was locating government lands.

Q. You were looking for a timber claim were you?

A. No, sir, I was locating people on timber lands.

Q. Eastern people, did you say?

A. Eastern people and western people.

Q. Principally eastern people?

A. Principally western people. I didn't locate any eastern people on Government lands in Eastern Oregon, it was all western people.

Q. From where?

612 A. From Portland and vicinity, Eastern Oregon and some in the Willamette Valley. I only located a few people. I located some scrip for Eastern people.

Q. You have been four years up there and have only located a few people.

A. Two years ago I located some people on Government lands. The rest of the time I was looking lands for eastern people and two years ago I located lands—no other time.

Q. What eastern people were you looking lands for?

A. Well Duncan and Brewer of Duluth, Minnesota.

Q. Who else?

A. J. H. Cook. He lives here in Portland, but he represents Pennsylvania people.

Q. And who else?

A. Well that's all about. W. N. Jones here of Portland I have also done some cruising for. I have also done some cruising for him; not locating though.

Q. These eastern companies, were they locating lands?

A. No, sir, they were not locating lands.

Q. They weren't having them selected?

A. I did it with a view to locating lands for them to put scrip on.

Q. To put scrip on?

A. Yes, sir.

Q. Did they locate scrip on these lands?

A. Some of them did, yes, sir.

Q. How much land did you select for them to put scrip on?

A. Well, I couldn't tell you. I selected probably in all, 15,000 acres.

Q. In two years?

A. Why, it was two years ago this summer that I was doing that.

Q. What were you doing the balance of the time?

613 A. Why I was looking lands in various ways; for instance, for W. N. Jones, I looked over a lot of land for him a year ago.

Q. Was he scriping too?

A. No, sir, it was state lands that I looked for him—school lands—estimating the amount of timber. I was working by the day that was the amount of it for him. I made reports. He may have put scrip on some of it, I don't know anything about that.

Q. Did you come into the employ of the government on the recommendation of these eastern people that you had work- for cruising lands?

A. I didn't understand you.

Q. Did you go in the employ of the government on the recommendation of these eastern people that you had cruised for, for lands to put scrip on?

A. I can't understand what you mean.

Q. I am asking you whether you got your employment for the government upon recommendation from these eastern people that you had worked for getting lands for them to scrip.

A. I wasn't aware that I had been in the employ of the government except what little I went out in these particular claims.

Q. Well, that is what I am asking about.

A. No, sir.

Q. You were aware you were in the employ of the government then, weren't you?

A. Well, if I was, it wasn't through eastern parties or western parties either, but the first thing that I knew Mr. C. E. S. Woods asked me to go out there for them: That's all I know about it.

Q. For whom?

A. For the Government.

Q. Now in making your estimates on this timber did you count the trees?

614 A. Counted the trees—tried to count every tree, and I think I did.

Q. Every tree, or every tree that you thought would make good lumber?

A. Merchantable tree; yes, sir.

Q. What you took for merchantable timber.

A. Yes sir.

Q. How many trees did you find on the southeast of the southeast section 18?

A. I can't tell you. I didn't put it down on my notes. I couldn't tell you the number of trees I found, now.

Q. You never make any memorandum of that at all?

A. At the time being we double-run the forty—double run that is, running twice through each forty, counting each tree, twenty rods on each side of us. When we got through we got the total amount. I didn't put that down. The number of trees. I never do in any of my estimates. I put down the total amounts. I have nothing but the amount of merchantable timber that we found which I think was 130,000 feet.

Q. What proportion of the trees did you consider merchantable, or about?

A. Any tree that was ten to twelve inches in diameter, and was a reasonably good tree, we counted every one of them.

Q. Well I am asking you what proportion of the trees that you found did you count as merchantable, about?

A. Well probably three-fourths of them.

Q. Three-fourths of all the trees you found on the land?

A. I think so, yes sir. Fully three-fourths, and every tree in some instances.

Q. Little or big?

A. Well, a tree, I said; that is, over ten or twelve inches in diameter.

Q. Well, I am saying all kinds of trees, what proportion?

615 A. Three-fourths I should say.

Q. Little or big?

A. I don't say anything about little timber at all. I don't know anything about the little trees that were on there 4 or 5 or 6 inches in diameter.

Q. Or 7 or 8 or 9 or 10?

A. I paid no attention to those little black-jacks. I never heard of anybody cutting them.

Q. Is wood of any value up in that country?

A. Well, I guess not. I don't know that it is.

Q. Is it prairie country?

A. It is prairie until you get up in section 14, 15 south, 18 east.

Q. The settlement is in a prairie country is it?

A. Principally.

Q. And Prineville is in a prairie country?

A. Yes, sir.

Q. Has firewood any value at all?

A. I couldn't tell you. I don't know anything about the value of firewood. This was twenty-five miles from Prineville or about that.

Q. You don't have any idea whether this timber has any other value than for lumber or not?

A. I don't know I am sure, I suppose it has some value. I don't know. I am not supposed to know anything about that part of it.

Q. Are there any of these pieces of land susceptible of cultivation except that piece of meadow, that you say is on the Williamson claim?

A. There would be by clearing, maybe, they could irrigate then. That would be the only way.

Q. What would it cost to clear it?

616 A. I couldn't tell you,

Q. $100. an acre or such a matter?

A. Why, it wouldn't cost that, for there ain't enough timber on it for that. It is mostly rocky land. It wouldn't be any good after it was cleared.

Q. It wouldn't be good for cultivation after it was cleared?

A. Very little of it.

Q. So it isn't really susceptible of cultivation?

A. I would- think so.

Q. It wouldn't be worth clearing at all for cultivation?

A. Nothing only a little few spots.

Q. The only value it has is for the timber that is on it and the grass? There is grass on it?

A. That's my idea of it exactly. That is how I look at it. The principal value would be the grass and the timber.

Q. What is the elevation of it?

A. Well, I can't say the elevation. It is somewhere around about 3500.

Q. Isn't it a good deal more than 3500 feet?

A. It might be a little bit more.

Q. Isn't it about 5,000?

A. I think Prineville is about 3200 isn't it?

Q. Isn't that a great deal higher than Prineville?

A. A little bit higher. I wouldn't — it was over 4,000 feet elevation.

Q. Isn't it more than 1,000 feet higher *feet* than Prineville?

A. I wouldn't think so; no.

Q. Isn't it up nearly all the way from Prineville to get to it?
A. A gradual rise most of the way, sir.
Q. And how far is it?
A. Twenty miles.
Q. Prineville is below the timber belt isn't it?
617 A. Well, as to its being below the timber belt I don't know as to that. There isn't any timber around Prineville.
Q. Prineville is at the junction of Crooked River and Ochoco, isn't it?
A. Yes.
Q. The Ochoco is a long stream, isn't it; winds around from the hills before it comes up? This land is about the headwaters of Ochoco, isn't it?
A. Well, it is somewheres up in that vicinity; yes; toward the head. I don't know where the head of Ochoco is.
Q. Well, doesn't some of this water from some of this land run into the headwaters of the Ochoco?
A. I believe it does run into the Ochoco, yes.
Q. The Ochoco is a stream some thirty miles long from there to Prineville, isn't it, and very rapid?
A. I couldn't tell you how far it is from there to Prineville. Only by the road they claim it is twenty miles.
Q. Well it is further by the stream, isn't it?
A. It might be. The first ten miles is nearly level.
Q. The Ochoco is a very rapid stream isn't it?
A. I don't know as it is. I couldn't say as to that. It didn't seem to be; it didn't seem to be very steep.
Q. Don't you know that it is so cold and so much snow up there that there is only a few months in the year that that land has any value for grazing purposes?
A. No, sir, I don't know that.
—. Don't know about that?
A. No, sir.
Q. Don't know anything about that? Don't you know whether people keep their stock up there in the winter time, or not?
A. Well, I wouldn't suppose they could. I would*n't* think there was too much snow. The general character of the country is such that I would suppose there was snow there.
618 Q. It is a rocky rough country, so rough that it couldn't be farmed successfully and be at a high altitude where it is cold and deep snow in the winter time.
A. It is level enough to be farmed, but I said it was too rocky.
Q. Some of it isn't level enough to be farmed is it?
A. Some of it isn't no.
Q. And all of it is rocky and covered with timber, so it couldn't be profitable to undertake to clear it for farming at all.
A. It is covered with rocks, and juniper and pine and other scrubs and other kinds of trees, small trees.
Q. Yes, and big trees.
A. Yes and pine I said.
Q. And rocky?
A. Yes.

Redirect:

Q. Mr. Murray, will you state what corner you found?
A. The first corner that I found was 18, 19, 13 and 23 on the town line.
Q. What other corners did you find?
A. Then we ran a mile east and found corner 17, 18, 19 and 20; a mile south towards the Biggs claim and found the corner of 20, 29, 19 and 30—19, 20, 29, and 30.
Q. Any others?
A. Then we went back afterwards and ran from the corner we found of 19. Then we went back afterwards and ran from the corner—the first corner we found of 19—and we went a mile north to the corner of 12, 13, 7 and 18; and then a mile west to the corner of 11, 12, 13, and 14. That's in two different townships you see; one is east of the town line, the other west.
Q. When did you cruise the Mrs. Williamson claim,—the one on Veazie Creek.
A. On July 24th I think.
619 Q. Was that on your way out?
A. It was on our way out, yes, sir.

Recross:

—. I wish you would look at the large photograph, Number 32, and tell the jury how many trees you would call merchantable appear on that.
A. Well that's a picture I have never seen before.
Q. Well, you can tell from the photograph, can't you, in a general way?
A. Yes, I think so. I can tell about twelve trees. The rest I can't tell whether they are merchantable or not. I don't know whether they are pine or not. You can't tell what kind of wood they are except the few that you can tell the bark.
Q. You think you can find about twelve merchantable trees there?
A. That I am sure of it, yes.
Q. That you think would be lumber trees?
A. Yes, there might be more, but I don't know whether they are pine or not?
Q. About how many feet of lumber appear on that picture, in your judgment?
A. I can't tell the size of the trees from this.
Q. As near as you can.
A. There might be 12,000 feet.
Q. 12,000 feet?
A. Yes, there might be more, there might be less.
Q. How many merchantable trees is there on number 7 would you say?
A. Well, those on number 7, I wouldn't call that merchantable timber.
Q. Any of it?

A. Why, not looking at it from a photograph, no.
Q. You would not include any such timber as that in your estimate; any of it at all?
620 A. Well, I say, looking at it from a photograph I wouldn't. I don't know how it looks when I see it. We don't estimate from photographs.
Q. Looking at it from a photograph you wouldn't consider there was a merchantable tree such as you would count in the estimate you made of lumber?
A. That's the way I answered.
Q. Yet you want the jury to believe that you counted in making your estimate, three-fourths of all the trees that you saw on all these different sections that were above 10 or 12 inches?
A. Yes, sir.

Redirect:

—. About how many merchantable trees (I hand you Plaintiff's Exhibit 174) do you see on that one?
A. I don't see any merchantable ones.
Q. And on Exhibit 175?
A. There aren't any there.
Q. You would hardly call that covered with a dense growth of timber, then, either of those two?
A. No, sir; sage-brush and juniper.

Recross.

—. You think, then, you could find some spots out there where there isn't any timber at all?
A. Plenty of them; yes, sir.
Q. Well, that's all right. I expect you could.

Witness excused.

621 WILLIAM J. MITCHELL, a witness called on behalf of the Government, being first duly sworn, testified as follows.

Direct examination.

Questions by Mr. HENEY:

—. Mr. Mitchell, how long have you been a detective?
A. I never was one.
Q. What is your business?
A. Assistant Special Agent of the General Land Office.
Q. How long have you occupied that position?
A. A little over two months.
Q. And before that, what business were you in?
A. Timber business.
Q. What experience, if any, have you had in timber cruising?
A. I have worked at it since 1894.
Q. Where?
A. In Minnesota up 'til 1902, and from that time in Oregon, Washington and California.

Q. Whom have you worked for in Oregon?
A. Well, I never worked for any particular firm here.
Q. Did you do any locating?
A. Yes, sir.
Q. Did you cruise for that purpose?
A. Yes, sir. Mostly.
Q. Did you make a trip to the Prineville country with Murray and Edgar?
A. Yes, sir.
Q. Did you cruise, on that trip, the northeast quarter of
622 section 24, in 15 south, 18 east?
A. We did.
Q. What is the general character of the timber upon that claim?
A. Well, the timber is very small, scrubby, with the exception of a few fir trees.
Q. What is the character of the ground as to grazing purposes?
A. Well, it lays on the east slope of what they call Cadle Butte, and the west half of it that lays up on the hill, is very rocky and very little timber, but as you get partly down the hill the two west forties is good grazing land and covered with timber.
Q. Did you make an estimate of it?
A. Yes, sir.
Q. And what is your estimate? Have you your notes?
A. Yes, sir.

Mr. BENNETT: What claim is that?
Mr. HENEY: That is Ernest Starr's.

A. The southeast of the northeast section 24, 15-18, 65,000; N.E. of the N.E., 75,000; N.W. of the N.E., 45,000; S.W. of the N.E., 15,000.
Q. Did you cruise the north half of the N.W. quarter, section 14, township 15, S., Range 18 E.?
A. Yes, sir.
Q. Can you tell us the general character of that quarter section?
A. The south half of the quarter section, that is it would be the south half of the 40's, there is a creek runs through, and a road along the creek, and south of the creek, and some places along the creek, there is some fir timber, but north of the road, that would be the north half of the claim or 40's——
Q. The 40's lie east and west in a string?
A. Yes. Would be a mile east and west. The timber is
623 very poor, and it is rocky and hilly.
Q. Now, what did you estimate the timber on each of the 40's?
A. On the N.E. of the N.E., 100,000; the N.W. of the N.E., 50,000; the N.E. of the N.W., 50,000, and the N.W. of the N.W., 35,000.
Q. Did you cruise the west half of the N.W. quarter and the west half of the S.W. quarter of section 20, in 15 S. of 19 E.?
A. Yes, sir.
Q. What is the general character of that claim, that quarter?

Mr. BENNETT: The Biggs' claim?
Mr. HENEY: Yes, it is the Biggs claim.

A. Well, the southwest of the S.W. quarter, that 40 is fairly level and the timber along the creek, which is fair timber; and in the northwest corner of the 40, there is some fair timber; the balance of the 40 is very poor timber and scattering; and for grazing purposes, it is what I would call fair.

Q. What waters are on it?

A. There is a creek runs through it, through almost the entire 40; it strikes the 40 almost near the center on the north side, and runs out.

Q. Which 40 is that?

A. That is the S.W. of the S.W.; it runs out of the 40 just north of the corner.

Q. Now, what did you estimate the different 40's in that quarter?

A. The N.W. of the N.W., 55,000 and the S.W. of the N.W., 40,000; the N.W. of the S. W., 80,000 and the S.W. of the S.W., 75,000.

Q. Did you cruise the east half of the N.E. quarter and the east half of the S.E. quarter of section 18, 15 S., 19 E.?

A. Yes, sir.

Q. What is the general character of that?

A. Why, the north half is pretty rocky; it lays up on a hill, and the south half lays—well there is a creek runs through it
624 and the timber lies on the east side and south, and on the west side of the entire claim there is almost hardly anything; on parts of it there is nothing on excepting on the north side of the N.E. of the N.E.; and on the south side of the S.E. of the S.E. there is some timber; on other parts of these two 40's has no timber at all, and the other two 40's lie in the middle; that would be the N.E. of the S.E., and the S.E. of the N.E. On the west side is no timber at all.

Q. What proportion of that has timber on it, about?

A. Why the south half; it all lies on the east side of these two 40's and the south, and on the north half it all lays along the line on the north side of the N.E. of the N.E.

Q. What proportion of it, of these 40's has timber on it? About what?

A. Well, on the S.E. of the S.E. I should say about a half of that 40 is covered with timber, and on the N.E. of the S.E., I should say about a third. On the S.E. of the N.E., there isn't any, and on the N.E. of the N.E., I should say about a third of that 40.

Q. Now, what do you estimate each of these 40's to have on?

A. The S.E. of the S.E., 95,000; the N.E. of the S.E., 110,000; the S.E. of the N.E., nothing, and the N.E. of the N.E., 100,000.

Q. Did you cruise the east half of the N.W. quarter and the east half of the S.W. quarter of section 26, township 15 S., Range 19 E.?

Mr. BENNETT: Which is that?
Mr. HENEY: That is the Ora L. Parker claim.

A. Yes, sir.

Q. What is the character of that?
A. Well, it is nothing but grazing land, is all I could see.
Q. You were along with Mr. McAlpin on a second trip up there?
A. Yes, sir.
Q. Is that the time you cruised this?
625 A. Yes, sir.
Q. When was that?
A. It was on the 17th day of August, 1905.
Q. Do you recognize those photographs?
A. Yes, sir. That is the first photograph we took on that claim, looking north.
Q. That is Government Exhibit 174? That is looking north?
A. Yes, sir.
Q. Do you remember from what point it was taken?
A. Taken from the line on the south side, right in the middle of the 40, and that is a down tree that shows, just at the line between the two 40's. This one here (Plaintiff's exhibit 175) is one that was taken at the north side of the N.E. of the S.W. looking south across the two 40's; that is at the north side of the 40, which shows practically the same as the other picture, only that is looking north and this is looking south across the 40 and show the general character of the country.
Q. How many 40's does it show?
A. It shows the whole country.
Q. Does that whole claim lie right up along there?
A. Yes, sir. It lies right north; we were looking south from here.
Q. Now, where on the claim is exhibit 176?
A. That is on the S.E. of the N.W., right in the middle of the 40, looking north; it shows about half of the 40; it very nearly takes in half of the 40. From here where the picture was taken, from this hill; there is a hill, and quite a ravine, and it takes in very near half of the 40, to there.
Q. Is there any part of it that shows any timber than what is shown on this photograph?
626 A. Yes, sir.
Q. And the 177?
A. Yes, sir.
Q. That is all the timber that there is on the claim?
A. Well, it is scattered along that 40. On the north side of the 40.
Q. And how much of that 40 is shown there?
A. Well, there is, I would judge, about five acres, or a little more, as near as I can tell.
Q. Is there any water on that quarter section?
A. Yes, sir. There is a creek running through—starts in the Northwest corner of the claim and leaves at the southeast corner of the claim; runs the entire length along the east side.
Q. Any water in the creek?
A. Yes, sir. There isn't running water though; there is lots of water, but no running water.

Q. Now, in the east half of the S.W. quarter, those are the two 40's that have no timber on are they?

A. Yes, sir.

Q. Any wagon road there?

A. Yes, sir, there is a wagon road runs up through the claim; it runs through the S.E. of the N.W.; runs through that 40. Kind of runs through northwest through there. I don't know where it goes to.

Q. The timber on the S.E. quarter of the N.W. quarter, how much of that has timber on it?

A. Why, there is just, on the north side of the 40, just a little there.

Q. About how many acres do you suppose is covered with timber? (That is the Ora L. Parker claim, S.E. quarter of the N.W. quarter).

A. I think there is about between six and seven acres.

627 Q. Did you estimate the timber there?

A. Yes, sir.

Q. How much?

A. 20,000.

Q. And the N.E. of the N.W. quarter, what has that on it, in the way of timber?

A. 40,000.

Q. And how is it located on it?

A. Why, there is a growth of small stuff pretty much all over it, except on the east side, and along the south side there isn't very much; it mostly all lays up on the west side—along the north side.

Q. How much of it is open land—what proportion about?

A. Well, there must be about 15 acres, I should think.

Q. Now, did you cruise the east half of the east half of section 22, in township 15 S. Range 19 E? (That is the Mona Graves claim).

A. Yes, sir.

Q. What did you find on that? What is the character of that?

A. Why, there is a creek runs up through—almost through the middle of that claim, and along the creek there are, I should judge, about the way I checked it here, is a tally on each side of the creek; that would be 125 paces, would make it almost half of the 40, and running up through the middle, along this creek, on either side of the creek, there was a meadow excepting on the N.E. of the N.E., and the timber came down almost to the creek there; in places the hills come right down to the creek.

Q. What sort of a grazing claim is it?

A. Why, I should call it the best, because it is right along that creek, and there is no good grass; of course, you couldn't tell then. The sheep had been over it just shortly before when we were

628 there.

Q. How is it as to how it lays? Is it level or not?

A. Yes, it is level. In the northeast corner, there is a hill; it lays in the valley; there is a hill on either side of the length of the claim.

Q. Could any of it be farmed?

A. Yes, it would be easy enough to cultivate that, I should think. It is level.

Q. Now the north half of the north half of section 8, township 15 S., range 19 E (the Charles A. Graves claim) did you cruise that?

A. Yes, sir.

Q. What sort of a claim is that?

A. That lies right up on the hill; pretty rock- up there; timber lays pretty much all over the claim, and has bunches of timber and patches of open ground. It lays up pretty high.

Q. What sort of a grazing land is it?

A. It is a good grazing land.

Q. What is the character of the timber on it?

A. "Very poor." Here I have it (referring to notes). Scrubby; small.

Q. I call your attention to photographs one and two. (Plaintiff's exhibits 178 and 179.) We will take 1 first—small photograph 1. What sort of timber is it that shows in that claim?

A. It shows the timber just about *4a* it is on the claim, because this picture was taken right where you could see the timber best.

Q. What size timber is that?

A. Well, it runs all the way from six inches to 24 inches at the butt, the base of the tree; it is small.

Q. What kind of timber is it?

A. It is yellow pine.

Q. How high to the first limbs?

629 A. Some of them is ten feet; some of them isn't over five feet.

Q. What is the average of it through there? How does that compare with any other timber on the claim?

A. Well, it is a good average of the timber on that claim.

Q. And how is — as to photograph No. 2? (Plaintiff's Exhibit 179.)

A. That is taken—it shows up the claim better than the other one, because that is taken where the timber is thick, and this is on another 40, between the other two 40's and showed the claim more as it is than that picture.

Q. This is the thickest timber on there, is it?

A. Yes, there was a bunch right there, just about on top of the hill.

Q. And the greater part of the claim is in what shape as compared with that photograph you have in your hand?

A. It lays like that, most of it. (Photograph 2, Plaintiff's Exhibit 179.)

Cross-examination.

Questions by Mr. BENNETT:

—. Do you say that there is a meadow on the Monia Graves claim?

A. What is the description?

Q. That is the east half of the east half section 22.
A. Yes, sir.
Q. Timothy meadow, is it?
A. No, it had never been cultivated.
Q. Oh, it never has been cultivated?
A. No, not to my knowledge.
Q. What do you mean when you say it is a meadow? Was there a crop of hay growing on it when you were out there?
A. Why the sheep had just been over it and cleaned
630 everything off. It was bare but you could tell there was lots of grass there, because there were places that they didn't touch and the grass had growed up.
Q. What kind of grass?
A. Well, wild grass. I don't know the different kind of grasses.
Q. You think wherever there is wild grass it is a meadow, do you?
A. No, I don't. Not exactly.
Q. What kind of grass was that?
A. I just told you I didn't know the kind of grass it was. It was wild grass, the same as it is over most of that entire country in there.
Q. What you mean is that there was a little bottom there. That is what you mean, isn't it?
A. I mean there was a meadow along the creek.
Q. A meadow?
A. Kind of a meadow, yes. I would call it a meadow. Of course the country in there at the present time is pretty well dried up, but the indications shows that.
Q. A meadow is a place where they grow hay, isn't it?
A. They could grow hay there.
Q. In its natural state?
A. No, by a little work.
Q. By cultivation you mean?
A. No, you wouldn't need to cultivate it; there is nothing to clear off of it. It would be very easy, I think.
Q. If you would put water on it, why then it might make a meadow?
A. Why, they could raise hay.
Q. If you would put water on it? Is there water enough there to irrigate it?
A. They could get water there.
631 Q. How large a stream is that?
A. There was no running water there.
Q. No running water at all?
A. There was plenty of water there, but no running water that we could see.
Q. Well, I say there was no running water there at all?
A. Well, there must have been running water. The character of that country is that it is so stony in the bottom of the creek, the water would sink, you see, and come up at intervals along the creek.
Q. If they would dig down there among the stones and get water, and irrigate the land, it would raise meadow, you think?

A. No. By going up on the N.W. corner of the N.E. 40, where the creek leaves the 40, why it would be a very easy matter to put in a little dam there and they could get plenty of water in the spring?

Q. On where?

A. Right in the N.W. corner of the N.E. 40.

Q. The N.W. corner of the N.E. 40?

A. Yes, sir.

Q. Well, if the water sinks, and there ain't any water there do you mean that they could go up there and get it with a bucket; dig down and make a hole, and get water, and go there with buckets and carry it down?

A. I mean they could build a dam there and catch water in the spring.

Q. And hold it there—store it, eh?

A. Well, there is plenty of water there now, but of course there isn't running water; not right there.

Q. No running water?

632 A. No.

Q. Then the only way you could irrigate without running water is to carry it out with a bucket, isn't it?

A. I never heard of that before.

Q. Well, did you ever hear of irrigating with water that didn't run? Of irrigating with water that sunk in the ground so that you would have to dig for it?

A. I have heard of them irrigating by building reservoirs.

Q. Yes, and if they would build a reservoir there, and store that water in the spring, they would irrigate it and make a meadow?

A. That is the only way they can irrigate mostly any place.

Q. How wide would that meadow be if they would make it that way?

A. Well, they can get a meadow there of at least 80 acres.

Q. Do you mean that half of that quarter section is level?

A. Right along the creek, yes.

Q. Half of the whole quarter section?

A. Oh, I wouldn't say half of the whole quarter section, because there is more meadow on the east half of the S.E. quarter than there is on the east half of the N.E. quarter.

Q. More meadow on it, did you say?

A. On the southeast?

Q. More meadow on the S.E. quarter.

A. On the east half of the S.E. quarter.

Q. How much meadow is there on the S.E. quarter of the S.E. quarter, that is, how much that could be made meadow if you would build a reservoir and store water? How much of that is level enough?

A. You couldn't build a reservoir there.

Q. I say how much is there of that on that S.E. quarter of the S.E. quarter, on that 40?

633 A. I don't quite understad your question.

Q. How much of this level land is there on the S.E. quar-

ter of the S.E. quarter of the section? How much level land along the creek is there?

A. Well, it is just half of the 40 wide; it is 250 paces would make the 40.

Q. Twenty acres then?

A. Yes, I should judge so.

Q. 20 acres on that?

A. Yes.

Q. Well, the next 40 north? That would be the N.E. quarter of the S.E. quarter. How much is there on that?

A. Well, there is, along the S.E. of the S.E.——

Q. The S.E. of the S.E is what I have been asking you about. Now I am asking you——

Mr. HENEY: He hasn't finished that answer yet.

Q. Well, go ahead and explain.

A. That 40 along the creek on either side, why there is more than 20 acres of meadow there.

Q. On the 40 you have just been talking about?

A. Yes.

Q. Then there is more than 20 acres is there?

A. Yes.

Q. Now you have got it up to more than 20 acres. How much?

A. Well, because on the south half of that 40, it is mostly all meadow.

Q. Well, how much meadow is there on that 40—the S.E. of the S.E.? That is, how much would it make meadow, if you had all the conditions?

A. Oh, there is 30 acres.

634 Q. Well, now take the next 40 north?

A. That is the N.E. of the S.E.?

Q. The N.E. of the S.E., yes.

A. Well, there is half of that 40.

Q. 20, eh?

A. Yes.

Q. On the next 40 north of that?

A. Not much, there is a little more on that; there must be in the neighborhood of between 20 and 30 acres, I should judge.

Q. Over half of it.

A. I should think so, yes.

Q. Well, how much would you say is there, 20 or 30—25?

A. Oh, I would say 20 acres.

Q. Well, now on the north 40, how much is there in the meadow on it?

A. Up 'til you get up into the north half of the 40, you get meadow along one side of the creek—on the west side.

Q. How much of this level land is there on that?

A. There must be 10 acres in there.

Q. Much much?

A. About ten acres, I should say.

Q. Is there any timber or brush on this land that you have designated as meadow land?
A. Yes, there is a little brush along the creek.
Q. A little brush along the creek?
A. Yes, bunches here and there.
Q. Is the course of the creek—do you claim the course of the creek is straight along there?
A. No, I don't.
Q. Or does it wind around?
A. I have it marked down here; I can show you the course
635 of the creek.
Q. Well, I am asking you if it is straight or if it winds around.
A. It winds around.
Q. At any place in that mile, does the creek get off from this string of 40's?
A. Yes.
Q. It does. Where?
A. On the S.E. of the S.E. of the N.E.
Q. The S.E. of the S.E.?
A. Yes, sir.
Q. Which side does it get off on there?
A. On the east.
Q. On the 23 or off on the 22, the balance of 22?
A. It gets off onto 23.
Q. How far does it run on 23 then?
A. I don't know. I didn't get onto 23.
Q. Well, then only half of the bottom along there is on this string of 40's.
A. Half of the bottom.
Q. Yes, the bottom or one side of the creek?
A. Oh, no.
Q. I asked you if the creek, at any place, ran off from this string of 40's in that mile.
A. Yes, it runs out of the 40, at just north of the corner of the S.E. of the S.E.
Q. Well, for how far?
A. How far north?
Q. Yes. How far along that mile does it run off from that string of 40's there at that point?
A. It doesn't run off at all; it runs the entire length of the four 40's excepting where it goes in and where it runs out.
636 Q. Well, now that is what I am asking you—if for that mile it runs all the way on those four 40's.
A. Yes, sir.
Q. Oh, it does, eh?
A. Yes, sir.
Q. Who was with you when you went out there and cruised that land?
A. A. B. McAlpin.
Q. Anybody else?

A. No, sir.

Q. You say there is some brush along the creek?

A. Yes, sir.

Q. How much of this 80 acres is covered with brush?

A. Why just along the creek. I don't say there is very much brush on the claim.

Q. How wide a strip on each side of the creek is covered with brush?

A. It isn't a wide strip at all; it lays right along the creek, you might say. The picture shows it up pretty good. I tried to get that.

Mr. HENEY: Mona Graves' claim?

A. That shows the brush.

Mr. HENEY: Which side of the picture?

A. Right here on the west.

Mr. HENEY: Where is the creek there?

A. Along here is the mark, right here; that is the creek where you see the brush, and the brush is in patches, just like that showthere, in different places along the creek.

Q. Now whereabouts is this picture taken on the claim?

A. If you can tell me the number of the picture, I can tell you.

Q. Can you tell from the picture whereabouts it is taken on the claim?

637 A. It was taken right in the middle of the 40—of the N.E. of the N.E. on the south side, looking north.

Q. In the middle of the 40?

A. Yes, sir, right there.

Q. On the N.E. of the N.E.?

A. From the south side, looking north.

Q. In the middle of the 40, east and west, is it?

A. Yes, the middle of the 40, east and west. Right on the line; right on the south line of the 40 in the middle of the 40, looking north.

Q. And this little depression along here is the creek?

A. Yes, sir; that there shows up some of the timber there too.

Q. And these trees and brush are in what you call the meadow, is it?

A. Yes, sir. Along the creek and outside of the creek; just these little things here.

Q. Where is the meadow on this picture?

A. It is right there. You can see it along the creek.

Q. On both sides of the creek?

A. Yes.

Q. This seems to be all covered with brush over on this side, doesn't it, and partly on this side?

A. The brush lays all along the creek, and there is just a little brush like that in there here and there; of course some places it would be a little thicker, but not to speak of.

Q. How deep is the depression here where the creek is, or where the creek would be if there was any running water there?

A. Some places it isn't over a foot and some places it is three feet.

Q. Now, how wide is that meadow at that point shown in
638 the picture, about the middle of the N.E. quarter of the N.E. quarter?

A. About as near as I can remember—I paced across there—as near as I can remember it is 180 some paces.

Q. 180 some?

A. Yes, sir. As near as I can remember.

Q. Right out on a line where the picture was taken from eh?

A. Yes, sir.

Q. Whereabouts on the 40 was that north and south?

A. North and South?

Q. Yes, right on the line?

A. Right on the line.

Q. Right on the south line of the 40, was it?

A. Yes, sir, the south line of the N.E. of the N.E., but right on the middle of the 40 looking north; of course the creek is crooked, you know; you can't catch all the meadow with a picture; you can only take a short ways, and we aimed to take these pictures right on the same spot in every 40, so that is the reason we didn't get as good a picture as we could have got.

Q. Did you find the corner post on section 22 as either corner?

A. Yes, sir.

Q. Where?

A. On the S.E. corner of section 22.

Q. Did you find the northeast corner?

A. No, sir; I didn't look for it.

Q. You didn't look for it?

A. No, sir.

Q. Was the S.E. corner the only one you found of that section?

A. That is all I looked for.

Q. Well, all the one you found, was it?

A. Yes, sir.

639 Q. Did you find any corner of section 26?

A. Yes, sir.

Q. Which one?

A. The southwest corner.

Q. That was all, was it?

A. That was all.

Q. You didn't find any half mile corners?

A. Didn't see a quarter post in the three towns.

Q. You didn't see any quarter posts up there at all?

A. No, sir, I didn't.

Q. Did you have a chain up there?

A. No, sir; we don't use a chain.

Q. What measuring you did, you did with a tape line?

A. We don't use a tape line; we pace.

Q. Just pace?

A. Yes, sir.

Q. Then all you know about the Ora L. Parker place is what you gather from pacing out from these two corners?

A. I know that I was just exactly where I wanted to be on that claim; that is, just exactly in the middle of it.

Q. You know that by pacing?

A. Yes, sir.

Q. That is the only way you know it? How much do you step?

A. Just according to the country I am working in.

Q. According to how you want the distance to come out?

A. No, sir.

Q. Now, you say you are not a detective?

A. I am not.

Q. I say, you say you are not a detective?

A. I never followed that business. I didn't know I was one 'til I heard you say so.

640 Q. Well, I am asking you if you are.

A. I say I am not.

Q. You say you are not a detective?

A. No, sir, I am not.

Q. You say you are a Special Agent?

A. No, sir.

Q. What are you?

A. Assistant Special Agent.

Q. Assistant Special Agent. Whom are you assistant to?

A. Mr. Neuhausen.

Q. How long have you been an Assistant Special Agent?

A. A little over two months.

Q. What has been your duties during that time?

A. Why any work that they put me at.

Q. What work did they put you at?

A. They put me at a hundred different jobs.

Q. A hundred different jobs in two months?

A. Well, I wouldn't say a hundred, but then they put me at a good many different jobs. Whatever they wanted me to do, I would do.

Q. Well, what was it? Give the general—it is only a short time?

Mr. HENEY: I don't think they have a right to go into what we have our Special Agents or Assistant Special Agents do. I object to that.

Mr. BENNETT: It is the man's business, Your Honor.

Objection overruled.

Q. What is the question?

A. What have you been doing?

A. Well, I have been looking -- timber, and watching
641 around seeing these fellows tampering with the witnesses, and such as that.

Q. Watching around to see if there wasn't any one tampering with the witnesses, eh?

A. Watching them tamper with witnesses.

Q. Following them around?

A. Well, not exactly.

Q. Watching them tampering with the witnesses, eh?

A. Yes, sir.
Q. Following them around?
A. Sometimes.
Q. Now, how much of the time for the last two months have you been following people around to see whether they tampered with the witnesses or not?
A. I didn't say that I was following them around to see them tamper. I say I have seen them tamper.
Q. I say, how much of the time have you been following them around to see whether they did or not?
A. Well, probably a third of the time.
Q. A third of the time?
A. It might possibly be. It might not be that much.
Q. Wasn't it more than that?
A. No, I don't think so.
Q. Hasn't that been your principal business?
A. No.
Q. Following people around?
A. No, sir.
Q. Been following witnesses around?
A. No. No.
Q. What say?
A. Not any of our witnesses.
642 Q. Not any of our witnesses?
A. No.
Q. None at all?
A. The Government witnesses, I mean. I don't mean mine.
Q. None of the Government witnesses, you haven't been following?
A. No, I don't recall following any now that I remember of.
Q. Don't you know whether you have or not?
A. I don't think I have. There is some of them that doesn't need watching, were you watching them?
Q. Those that did need watching, were you watching them?
A. No, I don't think I was.
Q. Wasn't you watching any of them?
A. Not them witnesses, no. Not the Government witnesses.
Q. You weren't watching Watkins?
A. No, sir.
Q. Nor Miss Vanderpool?
A. No, sir. I was watching Doc Gesner at that time.
Q. Watching Doc Gesner?
A. Yes.
Q. Oh, you were tagging him around, were you?
A. I wasn't tagging him around. I was just watching him; that's all.
Q. How long were you engaged in watching him?
A. Oh, probably half an hour.
Q. Is that the only time you ever watched him?
A. Oh, no. I watched him several times before that.
Q. Well, I mean altogether, how long were you engaged in watching Doctor Gesner?

A. Altogether, you mean?
Q. Yes.
A. Oh, probably four or five hours, putting all the time together.
643 Q. Been watching anybody else?
A. I watched you.
Q. How long have you been watching me?
A. Why, I don't know. It was two or three hours one night that you was out on the east side, I was watching you.
Q. Two or three hours in one night?
A. Yes, sir.
Q. I was over on the east side was I? Did you go over on the east side after me?
A. I was with you.
Q. You went with me?
A. Yes.
Q. I lived on the east side, didn't I?
A. I don't know whether you lived over there, but you expressed your *opening* a little bit over there to some ladies you was with.
Q. Oh, I expressed my opinion and you were watching along and listening?
A. I tried to catch what you were saying.
Q. You went over there for that purpose?
A. I did, yes.
Q. Spying along?
A. I saw you jumping around down there on First Street looking at the cars, and thought probably you was looking for somebody, and I was watching you.
Q. Was that part of your business as Special Agent?
A. I had no instructions to do anything of that kind.
Q. Was that the only time you were watching me?
A. No, I have had my eye on you several times.
Q. Had your eye on me a good many times. How many times?

COURT: I don't think that is *im*material, Judge, you are counsel in the case.

644 Mr. BENNETT: I submit to your Honor that this is detective work. They have been permitted to go into every relation of their own witnesses, with the defendants, and show just what they did for them and every place they worked for them.

COURT: It is relevant so far as it might directly affect the defendants, but I don't think it is pertinent to the issues at all.

Mr. BENNETT: Well, we will ask some further questions, and they may object, if they wish to.

Mr. HENEY: We don't object. You may go ahead with everything you want to.

Q. Were you watching anybody down on Washington Street near the Imperial Hotel yesterday?
A. What time?
Q. Any time yesterday?
A. Yes, sir.
Q. Who?

A. You.
Q. Me? You were watching me again yesterday?
A. Yes, sir.
Q. How long?
A. Oh, probably an hour.
Q. Who was watching Dr. Gesner while you were watching me?
A. I don't know.
Q. You don't know anything about that?
A. No, sir.
Q. Did you take it turn about, you and some other fellow, about watching the different defendants?
A. I don't understand you.
Q. Did you take it turn about, you and some other fellows, watching the different defendants?
645 A. I don't know anything about that at all.
Q. Who else did you watch? Did you watch Mr. Williamson?
A. No sir.
Q. You haven't been watching him?
A. No.
Q. Who was watching him?
A. I don't know anything about it whatever.
Q. You don't know about that.
A. No.
Q. Well, was you watching Mr. Biggs?
A. I would see where he would go, once in a while, when he came out.
Q. See where he would go?
A. Yes, sir.
Q. Follow him?
A. Oh, I don't know as I would follow him? I would go ahead of him sometimes. Sometimes behind him.
Q. You would follow along to see where he would go?
A. No, not exactly. I would be ahead sometimes.
Q. But you would stay along in his vicinity?
A. When I wanted to see where he would go, I would, yes.
Q. How many times have you followed him?
A. Only twice, I guess.
Q. And was one Alexander helping you to follow him?
A. No sir.
Q. He wasn't?
A. No, sir. I don't know the man.
Q. How long have you been engaged in this kind of business of following people around like that, and spying on them?
A. I wasn't watching people and spying on them.
Q. Listening to what they said and seeing where they
646 went, and so on?
A. Our instruction was to see that they wasn't tampering with our Government witnesses.
Q. Seeing that they weren't tampering with any Government witnesses?

A. Yes, sir.

Q. And to watch around them, see where they went and what they were doing. Is that it?

A. No, sir.

Q. Oh, it wasn't it. Which one of the Government witnesses did I happen to be with yesterday, when you were following me?

A. Yesterday?

Q. Yes, down about the Imperial Hotel; you say you were after me then.

A. I think you was with Senator Fulton, if I am not mistaken.

Q. With Senator Fulton that time?

A. I think so.

Q. He was the Government witness that I was tampering with then?

A. Oh, no. I didn't say you was trying to tamper with any. I was just watching you to see that you didn't.

Q. And so you saw me with Senator Fulton, and you were watching me then?

A. No, I wasn't watching you I just happened to see you go by, is all.

Q. You were around there watching to see if anybody did go by?

A. Oh, I was just looking around.

Q. But you are not a detective?

A. No, sir.

Redirect examination.

Q. Did you ever do any watching before?

A. No, sir, never did.

647 Q. And while you were watching Dr. Gesner, what did you see him do with Mr. Watkins, John S. Watkins? A Witness. Wasn't it you who saw the connection up here at the Lewis and White saloon?

A. No.

Q. Did you hear Dr. Gesner talking to a man named Cooper?

A. Yes, sir. At the former trial.

Q. During the first trial?

A. Yes, sir.

Q. After the witness had been on the stand?

A. Yes, sir.

Q. And what did he say to him?

Objected to.

Mr. BENNETT: Was Cooper a Government witness?

A. No, sir, he was a banker from Independence.

Mr. BENNETT: We object to that, may it please your Honor.

COURT: I doubt the competency of that, if he was not a witness. If it is a direct admission, it is admissible in direct testimony.

Mr. HENEY: I rather think it is, your Honor. I will write it out to show you. I do not want to get it before the Jury unless it is proper.

COURT: I think that would not be admissible. It might be proper

on rebuttal. I question whether or not it wouldn't have been proper to have stopped a part of the cross examination of this witness. But I think that is of doubtful admissibility, anyway, so I will not admit it.

Recross-examination.

Q. You weren't the man that was following Watkins up at
648 the Lewis saloon?

A. No, sir.

Q. That was another fellow? That was Snelling was it?

A. I don't know anything about it; never heard of it before.

Q. That was Spaulding?

A. I don't know the man.

Q. You know a man by the name of Spaulding, don't you?

A. No, sir.

Witness excused.

Whereupon proceedings were adjourned until Monday morning at 9:30.

649 SEPTEMBER 18, 1905—9:30 a. m., resumed.

WILLIAM J. MITCHELL, Recalled on part of the Government for further Cross Examination.

By Mr. BENNETT:

Q. Mr. Mitchell as I understand your testimony on Saturday you had seen some of the defendants or their attorneys tampering with some of the Government witnesses.

A. Yes?

Q. What ones?

A. Two of them.

Q. What ones of the defendants of their attorneys did you see doing that?

A. Mr. Biggs and Mr. Gesner.

Q. Mr. Biggs and Dr. Gesner?

A. Yes.

Q. Who were the witnesses?

A. Well, Mr. Parkey was one of them.

Q. Mr. Parkey?

A. Mr. Parkey, I think is his name, one of the gentlemen; and Charley Graves was another.

Q. Charley Graves was another?

A. Yes.

Q. Is that all?

A. No. There was more of them.

Q. What others do you claim to have seen either of these gentlemen or anybody tampering with?

A. I have seen them tampering with several of them, but I cannot recall their names now, there are so many of them.

Q. Where was it you claim to have seen Dr. Gesner—which
650 one of these men do you claim to have seen Dr. Gesner tampering with?

A. Well, I seen him with a gentleman by the name of Foster, a red fellow.

Q. Foster?

A. Yes. The next morning after he arrived in town on the second trial of this case.

Q. Was Foster a witness?

A. Yes, sir; for the Government.

Q. Did he testify?

A. No, sir; I think not; I am not sure.

Q. Has he ever testified as a witness?

A. I am not sure about that, I don't know. I know he was subpœnaed as a Government witness.

Q. Where was Dr. Gesner and Foster when you claim to have seen Dr. Gesner tampering with Foster? Where were they?

A. One time was at Minor Lewis's saloon on Morrison street.

Q. Where were you?

A. I was there, probably across the street.

Q. What was Dr. Gesner doing at that time?

A. He looked to me as though he made it his business to get hold of him before he came to see the Government. To see what they wanted — for.

Q. How was he tampering with him?

A. Well, any way that any person can tamper with a witness; there is only one way they can tamper with them. Talking with them and trying to persuade them not to testify.

Q. Did you hear what he said?

A. No, I didn't hear what he said but I heard afterwards?

—. ——.

A. Yes.

Q. But you did not hear yourself what was said at all?

A. No, I don't know as I did on that occasion.

651 Q. All you know is that you saw him talking with Foster at that time?

A. Yes.

Q. And that you call tampering with them?

A. Well, I know that Foster was not very friendly with the Government after that.

Q. That is what you call tampering with a witness, talking with him. Now, one other time did you see Dr. Gesner doing anything that you called tampering with Foster?

A. Well, I saw him down in front of the building one day talking with him.

Q. Where was Foster and Gesner then?

A. Right in front of the building here, downstairs.

Q. What were they doing?

A. Standing there talking.

Q. Standing there talking?

A. Yes, sir.

Q. Did you hear what was said?

A. I don't recall now, whether I did or not.

Q. Did you see the doctor do anything except talk?

A. I don't understand what you mean?

Q. Don't you understand that question? Did you see the doctor do anything except talk to Foster at that time?

A. I don't see how he could; and I——

Q. And you did not see him do anything?

A. He would not be very likely to do anything with me standing right behind him.

Q. Do you claim you saw Dr. Gesner tampering with Parkey?

A. Well, I seen Parkey go up to your room in the Imperial Hotel different times when he was under subpœna for the Gov-

652 ernment, and Dr. Gesner and yourself.

Q. You saw him go up to the room with Dr. Gesner. You think that Mr. Heney is tampering with these witnesses every time one of them goes up to his office and talks to him?

A. Well, the Government has them subpœnaed, I understand.

Q. You think that when one party has a whole lot of witnesses, the whole countryside, that they have a monopoly on them and the other side has no right to talk with them at all, and if they do they are tampering with them?

A. Well, not exactly, because you take a witness like Charley Graves and Mr. Parkey, and there is another gentleman, I can't call his name, I don't remember it just now, but take witnesses like that and I think they have been tampered with.

Q. What did you see there? Did you see Dr. Gesner say or do anything to Parkey except to walk up to their room together?

A. I could not see him, I did not go to their room; I know they would not go up there for anything in the interest of the Government though. If they did, they would not be afraid to talk down on the street or in the hotel or anywhere.

Q. When you were spying around they would be afraid to talk, you think?

A. No, sir; I was not spying around.

Q. You think it is honest inference to be drawn if two people walk up to the room together?

A. No, I don't think that.

Q. Who was the other fellow, Graves?

A. Yes.

Q. Where was it you claim to have seen Dr. Gesner tamper with Graves?

A. I claim I know of Graves tampering; I don't say what he was tampering.

653 Q. Where did you see Dr. Gesner tampering with Graves?

A. I didn't say that. I know Graves tampered with the Government witnesses.

Q. That is, talking to them you mean, the same as these other people?

A. Well, a little more than that.

Q. You don't claim to have seen Dr. Gesner tamper with Graves?

A. No, he did not need tampering.

Q. That is your opinion of it?

A. I know it.

Q. Whom do you claim to have seen Biggs tamper with?

A. Oh, I saw him on different occasions, down there at Princeville expressing his opinion very freely regarding the prosecution.

Q. You heard him expressing his opinion regarding this prosecution?

A. Yes, sir, not on the part of the prosecution.

Q. What witnesses do you claim to have seen him tamper with?

A. I claim I saw him express his opinion very freely regarding the Government officials when the witnesses were around.

Q. And you among the rest?

A. I was pretty close.

Q. He did not think much of you?

A. Well, not according to his opinion, no.

Q. What witnesses do you claim to have seen him tamper with, or do you claim to have seen anything more or heard him express his opinion pretty freely?

A. Yes, sir; I saw him on one occasion.

Q. When was that?

A. I can't recollect the date.

Q. Who was the witness?

654 A. Miss Vanderpool.

Q. Where was that?

A. It was on the street.

Q. Where?

A. On the way to the Oaks and different places.

Q. Whereabouts on the street?

A. Well, I can't tell you every place; I have seen them different places.

Q. What was he doing with Miss Vanderpool that you call tampering? Talking to her?

A. That is the only way that I ever seen that a person can tamper with a witness.

Q. Did you hear what he said?

A. No, I did not go right up to hear what was said.

Q. All you know is you saw him talk to Miss Vanderpool two or three times on the street?

A. I know that after he got through talking with her, she was not very friendly with the Government; she did not tell all she knew; I know that.

Q. She had never been very friendly to the Government?

A. Well, I know she did not tell all she knew?

—. ——.

A. Well, I know what she knew, pretty near.

Q. She would not swear to suit you and so you think she was not very friendly to the Government?

A. She would not swear to suit me at all.

Q. And you say Biggs talked to her and you think he was tampering with her.

A. She was not swearing to suit me at all, but I knew she did not tell what she knew.

655 Redirect examination:

Q. Who are the witnesses you heard Biggs express himself before at Prineville?

A. There was two of them; I can't just recall.

Q. Did you keep a memorandum of it?

A. No I did not. I can recall that when I went by, that Nadersson and Mr. Watts were standing just a short way from him, and as I went by him he said this to this man whom he was talking to, who was a witness here. I can't recall his name now.

Q. What did he say?

A. Well, I would not like to say what he did say.

Q. Why?

A. Because it was not fit language to tell in the court room.

Q. Did it apply to the witnesses or——

A. Well, it applied, the way I took it, to the witnesses and the Government officials also.

Q. On July 10th at 9:30 in the morning, at the Imperial Hotel, did you hear Dr. Gesner say anything in regard to the witnesses to James D. Cooper?

A. Yes, sir.

Mr. BENNETT: We object to that.

Mr. HENEY: I think this is proper redirect examination on this last cross examination.

Mr. BENNETT: I want to be heard on that, Your Honor. I have not said a word in relation to any talk as to the witness Cooper, and he was not a witness in the case at all. I have simply cross examined this witness as to his statement on redirect examination or on cross examination that he volunteer, that he had seen the defendants and their attorneys tamper with some of the Government wit-
656 nesses. I have confined my cross examination to that matter and to the Government witnesses.

The COURT: I think you have made this competent by your cross-examination.

The objection is overruled. The defendants except.

Q. What did you hear him say?

A. Why Cooper was sitting alongside of me in the hotel——

Mr. BENNETT: I want to bring out one fact before he goes on.

(By Mr. BENNETT:)

Q. Mr. Cooper was not a Government witness?

A. Not that I know of.

Mr. BENNETT: Now, I renew the same objection. I object as not proper redirect examination, incompetent, immaterial and hearsay.

Objections overruled. Defendants except.

Q. Go on.

A. Dr. Gesner came into the hotel, and Mr. Cooper said, "Hello, Doc., how is things getting along up there? Those fellows don't seem to want to tell all they know." Doc. says, "Oh, we are getting along pretty well;" he says, "They won't they dassent tell all they know; they know which side their bread is buttered on."

Q. At that time do you remember how long the case had been on trial?

A. Just a short while, just started, just shortly after Campbell Duncan had testified on the stand at the first trial; just shortly after that.

Q. Who is this Minor Lewis, and where is that saloon?

A. It is on Morrison Street, on the corner of Twelfth and Morrison, I think.

657 Q. What relation, if any, is Lewis to Gesner, do you know?

A. Well, he is related; I don't just remember what the relation is between them.

Q. During that first trial what was the habit of the witnesses as to going to Minor Lewis'; the Government witnesses?

A. They was all going there and they made it a kind of meeting place.

Q. What was the habit of Dr. Gesner as to going to Minor Lewis' saloon?

A. He was there as often as the witnesses were; seemed to make it a kind of headquarters all along.

Q. Did you hear Graves express himself to any of the witnesses in Prineville?

A. No, I did not hear him expressing himself to any of the witnesses, but I happened to hear something he did want me to hear, here in town though.

Q. In the presence of whom?

A. In the presence of—well, I don't know as there was any one else except the man that was telling this.

Q. Do you know who that man was?

A. Yes, sir.

Q. Who?

A. Charlie Nelson, night bartender in the St. Charles Hotel.

Q. And this was something Nelson said to Graves, wasn't it?

A. Yes, sir. I was not—he was alluding to another man.

Q. I forgot to ask you when you were on the stand before, did you cruise the claim of Jeff Evans?

A. Yes, sir.

Q. Located there (referring to the map)?

A. Yes, sir.

658 Q. It is the west half of the east half of section 2, township 16. Describe that claim please; what is the character of it?

A. The west half of the east half, section 2, 16 S., 18 E., the south half of the claim, that would be the west half of the southeast quarter, laying in what I would call a canyon. There is a mountain on the west side of it, and on the east side it is not exactly a mountain

but a high hill, and this lies tight in the ravine, and the north half is rocky and hilly and rough, but the hills are not so high and there is a more gradual slope to the west and to the east.

Q. Is there any water on that claim?

A. Yes, sir; there is a creek runs through the entire length of it.

Q. What sort of a creek? One of those without water in it?

A. No, it seems that there must be some spring in there, in about the north-east quarter, and above that there is no running water; of course there was plenty of water, but no running water; but south of that in the creek there was plenty of water and the farther down the creek the more water.

Q. Running?

A. Running water, yes, sir.

Q. How much timber was there on that claim?

A. I would not put an estimate; I counted thirty-nine trees.

Q. Do you think you counted all the merchantable trees on the claim?

A. I counted more than—I counted all I could see that would be any ways liable to be a pine tree. There was some small stuff there that I didn't count.

Q. How many trees were there altogether?

A. Thirty-nine trees.

659 Q. I will show you a photograph marked No. 28 small, which I will identify by the photographer later. Do you identify that as a photo. of a portion of that claim?

A. Yes, sir.

Q. You were along when that was taken, were you?

A. Yes, sir. That photograph was taken right in the center of the north line of the southwest of the northeast quarter, looking south. It shows right in the hollow, the creek down there in the ravine, and on this side of the picture here, is where the mountain is I spoke of, and on this side——

Q. On the east side of the picture?

A. On the east side of the picture looking south is the hills, and on the west side is the mountain, which does not show here. The other picture, which will be 29 I think, would show the mountain.

Q. There must be more than thirty-nine trees there. What sort of trees are these that show there?

A. Well, that is an inferious quality. You would not call them trees. They are small, not over eight inches through.

Q. How high are they?

A. And I aimed to take everything over twelve inches through, but these here, there are a lot of them along the creek that are small, but a few fir trees also.

Q. Do these things extend all along the creek in that way?

A. No, just about from the north line of the southeast of the northeast, down to about the middle of the northwest of the southwest, the middle of that quarter.

Q. Farther on how is it?

A. It is an open country.

Q. Is that open country you see back there in the photograph?

377

A. Yes, sir.

660 Q. The claims run north and south?—four forties in a string?

A. Yes, sir.

Q. I show you a photograph marked No. 27, small. Is that a part of it?

A. Yes, sir.

Q. Are these some of the trees you counted that appear in that photograph?

A. Yes, sir. There are some of the trees.

Q. Were there any trees on there any better than these?

A. These are the best trees we saw right there on the hill. This is right on the north line, on the town line, in the middle of the forty looking south, of the northwest of the southwest; right in the middle of the forty.

Q. When you said those are the best trees you mean these on the right hand side of the photograph, looking at the photograph?

A. Yes, sir, that tree, and then there are some more right along here that do not show in the picture. We tried to get those, but we did not.

Mr. HENEY: We will offer photographs No. 27 and 28 in evidence.

Received and marked Government's Exhibits 186 and 187.

Q. I show you a photograph, No. 30 small, is that a part of that claim?

A. That is a photograph we took looking west; right in the center of the two forties on the line of the west half of the northeast, right in the center of the two forties, looking east across. Just take half of a forty, took it right here in the center of this forty looking west.

Q. This is on the line between the two?

A. Between the two forties looking west in the center.

661 Q. The norther-most forty and the one just below it?

A. Yes, sir.

Q. And at that end of the claims is where this timber is?

A. Yes, sir.

Mr. HENEY: We will offer photograph No. 30 in evidence.

Received and marked Government Exhibit No. 188.

Q. Did you examine the northwest quarter of the northeast quarter of section 28, 15 S., range 19 E., the Henry Hudson claim?

A. Yes, sir.

Q. How is that as to timber as compared with the rest of that township?

A. It is just about the same as the balance.

Q. What is your estimate as to the amount of timber on that claim?

A. The southeast of the northeast, 75,000 feet; the northeast of the northeast, 35,000; the northwest of the northeast, 90,000; the southwest of the northeast, 100,000.

Q. On the southeast of the northeast, 75,000, what kind of timber is that?

A. Well, it is right along the line, on the east side along the section line in the middle of the forty. There are a few nice trees there, but the balance of the forty, with the exception of right around the spring on the east side, where there are a few nice trees, is a very poor quality of timber.

Q. How is that for water?

A. There is lots of water there; there is a spring on the west side of the forty with a nice little small stream running out of it and then there is a stream comes into the claim at the northwest corner and runs southeast down through the northwest of the northeast to the southwest corner of the northeast of the northeast, and runs almost east in to the east side of the southeast of the northeast and
662 runs right south through that forty.

Q. Which is the best of these forties for timber? Which has the most timber on of all the forties?

A. The southwest of the northeast.

Q. Has that any water on it?

A. Well, it has a spring.

Q. The northeast of the northeast, in that section, township 28-15 S. 19 E., what sort of a forty is that?

A. Well, that is open. There is a little timber right along the line on the north side and on the west side of the forty.

Q. What kind of timber is it?

A. It is pine timber, very tall and scrubby. The balance of the forty is open, nothing on it at all.

Q. What kind of grazing?

A. Fine grazing land. Of course it was bare, the sheep had just been over it; we saw them the day before on this land and they cleaned everything off. It was good grazing.

Q. The northwest quarter of the northeast quarter of section 28, as to whether it has water on it or not?

A. This creek runs right through it, almost through the center of the forty; runs northwest and southeast. There is plenty of water there.

Q. Did you cruise the northwest quarter of the southeast of 28, township 15, south range 19 E., or did you cruise the whole of the Christian Feuerhelm claim, which would be the northwest of the northeast of the southeast of the northeast, and the southeast of the northeast 28-15, south range 19 E.?

A. Yes, sir.

Q. Describe that?

A. The southeast of the southeast of 28, 15-19——

663 Q. That should also have included the southwest of the southeast, making the four forties?

A. Yes sir. The southeast of the southeast has 75,000 feet of timber, and it has two creeks, one running in from the northwest, and other coming in from the north. They join about third of the way in from section line on the east side and run down leaving the forty about the middle just a little north of the middle running east. There is a good road also that runs through that forty, right along the creek, south of the road, that would be about half of the forty,

there is timber pretty well all over, small scrubby timber, some of it pretty fair trees and then some of it pretty poor. There is quite a hill there, rocky but good grazing country. The north half of the forty, along the creek, along the creek running west, there is quite a lot of brush, poplar, second growth, averaging from two to four inches through. And nothing on it at all, but just an open country, sage brush, pretty rocky and plenty of water. Did you ask me to describe all of them?

Q. Yes.

A. The southwest of the southeast, the timber runs pretty near to two acres of open ground where there is nothing on it at all but sage brush and grass, and there would be that much of a bunch of timber in a scattering way. I have estimated 50,000 feet of timber on that forty, small timber. That is scattered pretty much all over the forty, which comes out on to that open place, which is the same as the north half of the southeast forty. The northeast of the northeast has a creek running in there the entire length of it, and the creek from the spring on the Hudson claim comes in on this forty and joins the creek on this forty also; both creeks join there and have plenty of water. The north half of this forty, that is
664 along the line, I would judge not to exceed over eight inches, is timbered. There is 40,000 feet of timber on that and the entire rest of the forty is bare; there is no timber at all with the exception of long the creek there are a few trees scattered along there, and good grazing land and there was lots of stock on there when we were there.

The northwest of the southeast has no timber on it at all except in the northeast corner forty, not to exceed over five acres at the most, 20,000 feet of timber, and the rest of the forty has not timber on. It is good grazing land. On the west of the forty in the middle, in the center of the forty on the west side, right on the line, is a spring; where this water comes from it runs down and joins the other creek in the southeast of the southeast. This creek that runs out of that spring seems to come out there and it is rocky below, pretty rough and rocky on the side hill, sloping to the south and where the water leaves the spring it sinks into those rocks, but comes up at intervals along down until it joins the other creek.

Recross-examination.

By Mr. BENNETT:

Q. Did you find the corner stone on the Jefferson V. Evans claim?

A. Yes, sir, I found the northeast corner.

Q. The northeast corner of the claim?

A. The northeast corner of section 2 on the town line?

Q. Did you find any other corner of the section of section 2?

A. I didn't look for any other corner.

Q. Did you find any corner of the Evans claim?

A. It is the Evans claim I am talking about. I found the north east corner of section 2.

Q. The corner of the section was not the corner of the Evans claim was it?

665 A. Now it is a quarter of a mile from the Evans claim, just across the forty.

Q. You stepped off a quarter of a mile did you, from the corner?

A. Yes, sir; a little over a quarter of a mile.

Q. And you called that the corner of the Evans claim?

A. No, sir; I did not.

Q. What did you call it?

A. I ran from the northeast corner to the center of the northwest of the northeast forty.

Q. How far was that?

A. Well, that was just six tallies and a half.

Q. What do you mean by tallies?

A. Paces.

Q. Six paces and a half.

A. I mean tallies, six hundred paces.

Q. You ran from the northeast corner of the section, six hundred paces and called that the corner of the Evans claim?

A. I did not call it the corner; I called it the center. I knew it was the center of the northwest of the northeast quarter, the center of the quarter.

Q. The center of the northwest?

A. Of the northwest.

Q. Six hundred paces took you to the center of the northwest of the northeast?

A. Yes, sir.

Q. That was half way the middle of the Evans claim?

A. Yes, sir; the center of the forty on the section line.

Q. How did you know you were at the middle of that forty?

A. Because I ran a compass and paced it.

Q. What kind of a compass?

666 A. I had a Gurley compass.

Q. Is that a pocket compass or set on a tripod?

A. A pocket compass.

Q. About how big?

A. A four inch needle.

Q. Are you a practical surveyor?

A. Well, I don't claim to be a surveyor; I am a woodsman.

Q. Was there any surveyor along with you?

A. I did not need any.

Q. I asked you if there was any.

A. Well, I was doing the surveying. There was no surveying to do, all there was to run the compass.

Q. You were the only surveyor; no one with you then?

A. I didn't need a surveyor. I ran on the section line.

Q. Why can't you answer whether there was a surveyor with you then?

A. Well, there was not need.

Q. Let the jury decide. Was there a surveyor with you?

A. I have surveyed.

Q. Was you a surveyor?

A. I don't claim to be a surveyor, but I have surveyed.

Q. Was there a surveyor with you?

The COURT: Answer that question, was there a surveyor with you?

A. No, sir; only myself.
Q. Who else was with you?
A. A. B. McAlpin.
Q. Who else was with you?
A. A. B. McAlpin.
667 Q. The photographer?
A. Yes, sir.
Q. Was that up and down hill? Was it an up and down hill country?
A. From the corner?
Q. Yes.
A. Down hill, yes.
Q. All the way down hill?
A. From the corner down to the middle of that 40, yes, sir.
Q. All the way down hill?
A. Yes, sir.
Q. A rocky country?
A. Yes, sir, rocky.
Q. Any logs?
A. No, there wasn't any logs.
Q. Any underbrush?
A. Well, there was some sagebrush.
Q. What did you find for the corner there?
A. I found a pile of rock, piled up there; they were probably a foot high; that is there was a big flat rock set on the top; that was the corner, with marks, corner marks, on it.
Q. What marks did it have on it?
A. Well, on the corners where there is a——
Q. I am asking you about that corner, Mr. Mitchell. What marks did that corner have?
A. That corner had one mark on it.
Q. One mark?
A. Yes, sir.
Q. What kind of a mark?
A. On the east side of the rock.
668 Q. On the east side of the rock; what kind of a mark?
A. Just a chip out of the side of the rock, and one witness tree.
Q. Had one chipped place on the east side?
A. Yes, sir.
Q. And one witness tree?
A. One witness tree.
Q. What kind of a witness tree did you find?
A. Why, it was a yellow pine tree, I should judge about a foot through.
Q. A yellow pine tree about a foot through?
A. Yes, sir, set on section 36, town 15-18.
Q. How was it marked?

A. Why, it was marked "Section 36, town 15-18."
Q. Did you chop into it?
A. No, I am mistaken about this; this was 35, section 35, 15-18, and the stone, there were two notches out of it. I was thinking I was on section 1.
Q. Oh, you remember now that there was two notches on the stone?
A. Yes, sir, I do. There was only one notch on the stone, but the bearing tree was on section 35.
Q. There was one notch or two on the stone?
A. Just one.
Q. Just one. You have got back to the original now?
A. Yes, sir. I was mixed on that.
Q. How do you say the bearing tree was marked now?
A. Why, it said section 35, Township 15 S., Range 18 E.
Q. Anything else?
A. That is all there was; that is all I could find on any of those corners; one bearing tree.
Q. Did you chop into the tree?
A. No, sir. It was open. You could read it very plainly.
669 Q. Fresh mark, was it?
A. Yes, sir. No it was no fresh mark; it was an old mark, but then you could read it without chipping it.
Q. It wasn't overgrown any.
A. No, sir. Not so that you couldn't read it.
Q. Was the tree a dead tree or a live tree?
A. A live tree, yes, sir.
Q. Do you know when the surveys were made in there?
A. No, sir, I do not.
Q. Now, this photograph No. 28, where did you say that was taken from?
A. That was taken from the center of the S.W. of the N.E. on the north line, looking south, right there.
Q. From the center?
A. On the north line of the S.W. of the N.E., looking south.
Q. That is it was the line between the north and south, between the two; it was on the line between the two north 40's of the claim?
A. Yes, sir.
Q. The claim lay a mile straight north and south, didn't it?
A. Yes, sir.
Q. And this was taken right between the two north 40's?
A. Yes, sir.
Q. As you claim half way across the 40?
A. Yes, sir.
Q. And it was looking south, was it?
A. Yes, sir.
Q. Then that claim extended for three quarters of a mile from where this picture was taken?
A. Yes, sir.
670 Q. Now what kind of timber is this up here on the hillside?
A. Well, you couldn't call that timber; I would call it brush.

Q. Oh, you call this brush, do you?
A. I would, yes.
Q. You don't call that timber at all?
A. No.
Q. Now is it up on this? Is it about the same up on that hillside as it is here?
A. There is nothing at all up on that side.
Q. Nothing up here?
A. No, sir. It is an open country, just the same as this over there that you can see.
Q. How far do you go beyond the margin of the picture—does the open country commence right at the margin of the picture?
A. No, that picture takes in all the timber there was on that claim, because we aimed to take the picture the same place on every 40, and we taken that picture there, and it show that is the only bunch of timber; with the exception of a few trees north of there, and that bunch south of there, there was nothing on it at all.
Q. I am asking you how far this timber that runs up there that you can see on the picture—the brush if you choose to call these trees brush—how far that extends to the left beyond the margin of the picture; it shows on the picture extending right up in a solid body to the margin of the picture. Now how far, as a matter of fact, does it extend beyond that?
A. Well, it does not extend very much farther than that, because the hill comes right around there; that makes a kind of ravine that runs up there; this ravine goes up to very near the edge of the 40 on the east side.
671 Q. How far do you claim that it extends beyond the margin of the picture, this body of timber here, or brush as you call it, on the right of the picture?
A. Well, I can't——
Q. How far does it extend up on the hillside there in the margin of the picture?
A. It doesn't extend up on the hillside, at all. It is just along the creek.
Q. Isn't this up on the hill? Isn't this timber on the hill?
A. No, sir.
Q. Isn't it on the edge of the hillside?
A. No, sir. It is down along the creek.
Q. Where is the best timber in that country? On the hillsides or along the creek? In the canyons or along the ridges?
A. The best timber, some places it has been along the creek and some places it has been on different parts of the 40, where there was no creek.
Q. Well generally, is the best timber along the canyons or on the ridges?
A. Well, it generally is. Yes.
Q. Where? You say generally. I asked you if it is generally the best along the canyons or the ridges.
A. Generally along the canyons.

Q. And it is in the canyons that the creeks and springs are, isn't it?

A. Well, in the canyons is generally where you find the creeks, but not the springs.

Q. Don't you generally find the springs in the heads of the canyons and along down the canyons?

A. No, you generally—you find them right up on top of
672 the hill, sometimes.

Q. Once in a while, but as a rule, you find them on the heads of the canyons and along in the canyon, don't you?

A. Well, I don't know about that: I didn't find any that way.

Q. You didn't find any that way at all?

A. No.

Q. You didn't find any springs in that country in the head of canyons?

A. No, not that I can remember.

Q. Now, that Jefferson D. Evans claim is considerably nearer to Prineville and to the prairie country than these other claims, isn't it.

A. Yes sir. It is right in the prairie country. It is about—very near—well, I would say, a mile and a half from the timber line, south of the timber line.

Q. Of the main heavy timber line?

A. Well, there is no heavy timber line, but the timber line in that country north of it.

Q. Now, that is the nearest timber that there is to the farming country, there, isn't it?

A. On the Jefferson D. Evans?

Q. Yes, on the Jefferson D. Evans.

A. There is no timber on it.

Q. Well, you have just stated that there was timber on it, haven't you?

A. I said there was 39 trees.

Q. Well now, that is timber isn't it? If there was only just the 39 trees that you have testified about now, it is the nearest timber, isn't it, to the Crooked River farming country, that there is anywhere in that country?

673 A. Well, I don't know where that is. I don't know where the Crooked River is.

Q. Don't you know where the Crooked River is?

A. No, sir.

Q. Do you know where the farming country along Crooked River is?

A. Going out from Prineville out there, do you mean?

Q. Well, do you know where Crooked River is?

A. I can't say that I do.

Q. Well then, you don't know how far this timber is from Crooked River and from the farms around Crooked River?

A. Well, I am saying there is no timber on that claim—39 trees, which is no timber.

Q. 39 trees is no timber at all?

A. And the timber is at least a mile and a half north of that claim.

Q. 39 trees is no timber at all, isn't it?

A. Well, I wouldn't call it a very good timber claim; no.

Q. Well, I am not asking you about the timber claim; but I am asking you what timber there was on that claim, whether it be much or little, is the closest timber there was to the farming country—right almost at the farming country?

A. Well, of course I don't know what is south of there, but you take what is west of there I think it would be the furtherest away.

Q. You think that would be the furtherest away from the farming country?

A. I should think so; yes.

Q. Furtherest away from Prineville?

A. Yes, sir; I know it is.

Q. Didn't you say a while ago it was the nearest—it was much nearer than these other claims to Prineville?

674 A. No, sir; I did not.

Q. How does the road from Prineville go up into that country?

A. The road from Prineville goes through section 14-15-18.

Q. That is, township 15-19 here?

A. Yes, sir.

Q. This is 15-19?

A. Yes, sir.

Q. And this is 16-18?

A. Yes, sir.

Q. Now where is Prineville?

A. Prineville lays off to the west here.

Q. Lays off clear to the west?

A. Yes, sir; the road goes down in this shape—comes right through—this is Mrs. Williamson's claim right there—in here and into the sheep shearing plant down this way and out of the town down in here in either section 33 or 34 leaves this town here, and I didn't see any road——

Q. You claim that Prineville is west of here?

A. Well, it must be a little north of west I think.

Q. Doesn't Crooked River run up in here somewhere?

A. I don't know about that.

Q. Doesn't Horse Heaven Creek run down through here and run into Crooked River down here somewhere?

A. There is no creek running down through there at all that I saw; that is, running water.

Q. Now don't you know, Mr. Mitchell, that when you get down close to the farming country there that timber becomes very valuable for firewood?

A. Yes, sir; I should judge it would.

Q. Even although it may not be large enough for lumber trees?

A. Yes; any timber would be very valuable I should think.

Q. Where do you claim that this picture was taken from;

675 that is number 27?

A. That was taken on the town line looking south on the center of the northwest of the northeast—looking south.

Q. That is, if you found the location of the 160 correctly, why this was on the very north line of the north 40?

A. Yes; in the center of the 40.

Q. And looking south?

A. Yes, sir.

Q. Which is this timber—here seems to be a big grove of timber down through there extending along down the slope,—now is that on that claim?

A. That is not timber; that is the tops of the other trees along the creek you can see.

Q. There ain't any trees at all of any size, large or small along up and down this slope, ain't there?

A. These are the biggest ones you see right here.

Q. I am not asking you about the biggest ones; I am asking you do you mean to say there are no trees, large or small, along that slope in the background of the picture there?

A. I don't think there is.

Q. You don't think there is?

A. No, sir.

Q. You are as certain of that as of everything else you have testified to, are you?

A. Well I am certain of everything I testified.

Q. Even to this last. Now where was this picture taken from?

A. That was taken in the center of the two north forties looking west.

Q. In the center of the two north 40's: looking west?

A. Yes, sir.

Q. That is, looking up the hill, up the side hill?

676 A. Yes, sir.

Q. Well now, how far to your right does this grove of timber that shows in the picture—how far does it extend to the right over this way?

A. Why the creek is right there. You see right along here. And that you cannot call a timber; it is brush growing along this creek, and that is the tops of it you can see along there, which makes it look as though it was timber along the hillside.

Q. Makes it look as though it was timber?

A. Yes, sir.

Q. How high are those trees you call brush there?

A. There might be some of them 50 or 60 feet.

Q. That is the height of the "brush" there, is it?

A. Well, it is practically brush. It isn't over six inches through the biggest part of it.

Q. Do you mean to say that those trees in there that show in this picture 50 or 60 feet high are not over 6 inches through at the butt?

A. Yes, sir.

Q. None of them?

A. Oh, I wouldn't say all of them; there might be pine-tree-mixed in there easily.

Q. Isn't it a fact that nearly all of them are more than that?

A. No, sir; it is not.
Q. Now, do you claim you found the section corner on section 28?
Q. What town?
Q. 15-16; the Hudson and Feuerhelm places.
A. Yes, sir; found two corners on that section; found the southeast corner and the northwest corner.
Q. The southeast corner?
677 A. Yes, sir; and the northwest corner.
Q. How were they marked?
A. The northwest corner was on a big flat rock; the rock I should say about—well I wouldn't attempt to say just how big it was but I know it was bigger than the average that we had seen through there.
Q. Was there any mark on that northwest corner?
A. Yes, sir; there was some chips on the side.
Q. How many chips on the north side.
—. —.
Q. What say?
A. It was chipped out on the north and the east side.
Q. How many chips on the north side?
A. Well I don't just recollect but there is a chip out for every mile to the north; if it was four miles it would be 4 chips.
Q. How many chips on the east side, if you don't recollect on the north side?
A. It would be the same way on the east side. It would be the same way to the east line.
Q. You don't remember how many there were on that section?
A. I don't just recollect now.
Q. Was it marked any other way.
A. Yes, sir; there's a witness tree.
Q. What kind of a witness tree was there there?
A. Well I think it was a yellow pine tree. It set in on section 28.
Q. How is that marked?
A. That was marked "Section 28, Town 15 south, range 19 east."
Q. You remember that do you?
A. Yes, sir.
Q. Township what?
678 A. Township 15 south, range 19 east.
Q. How far was that section from the bearing tree?
A. The section corner from the tree?
Q. Yes.
A. Well I think it was about—oh, it was possibly 20 feet, I should judge. I didn't measure it.
Q. Well, you remember it was about 20 feet?
A. I should think it was about that: yes. It set southeast from the corner.
Q. That was the northeast corner, was it?
A. Yes, sir; the northwest corner of section 28.
Q. Now how is the southeast corner marked?
A. The southeast corner was marked with a rock for a corner with the chips out and one bearing tree.

Q. One bearing tree there?
A. Yes, sir.
Q. What kind of a bearing tree?
A. Yellow pine.
Q. Another yellow pine?
A. Yes, sir.
Q. You don't remember the number of chips on that?
A. The number of chips on the rock, you mean?
Q. On the stone?
A. No; I don't remember.
Q. Don't remember the number of chips on the stone?
A. I harly ever—I would locate the corner and then I would look at the bearing tree and hardly ever counted the chips.
Q. How many chips would there be if that was the right corner?
A. Well there would be a chip for every mile to the north line; that is, the town line on the north side and a chip for every mile to the range line on the east side.
679 Q. How many chips would that be for that section?
A. I couldn't tell you. Give me a map. I would know if I had a map.
Q. Did you find any quarter corners?
A. No, sir; I didn't find a quarter corner in town.
Q. And you didn't find any corner on Hudson's claim at all?
A. Didn't need a corner.
Q. I am not asking you what you needed. Did you find any corner on the Hudson claim?
A. I didn't look for any.
Q. Well, did you find any?
A. No, sir; I didn't find any. I didn't look for any.
Q. You didn't find any? You figured on that claim by stepping from which corner?
A. From the northwest corner.
Q. How far did you step across there?
A. I ran a half a mile right on the section line.
Q. How many steps was that?
A. Well, that would be 8 tallies.
Q. 800 steps?
A. Well, there might have been more and there might have been less.
Q. Well, what do you count for half a mile there?
A. Well, I ran 8 tallies, but some tallies I stepped longer than others and some tallies would be shorter, according to the country; if it was rough country it would take more; if level country, less.
Q. Fixed it up that way as best you could?
A. Oh, no; I knew exactly where I was.
Q. In this particular instance did you step long or short?
A. I don't just remember I know it was pretty rough. I
680 think that possibly I took a little more.
Q. A little longer steps than usual?
A. I might have; if it was rough I did.
Q. But you stepped just 800 steps, did you, for half a mile?

A. Oh, no; oh, no; I wouldn't say that; but 8 tallies.
Q. Well, ain't that 800 steps—8 tallies?
A. No, sir.
Q. Don't you make a tally for every 100 steps?
A. No, sir.
Q. What do you call a tally then? I understood you that a tally was every 100 steps a while ago?
A. I count a tally—125 paces is a tally.
Q. 125 paces for a tally?
A. Yes, sir.
Q. Then when you step off 8 tallies you stepped off 1000 paces, did you?
A. Well, yes; practically speaking.
Q. And you stepped off 1000 paces from the northwest corner and called that the corner of the Hudson claim?
A. Well, I knew it was the northwest corner of the Hudson claim.
Q. Did you find any mark there?
A. No mark at all.
Q. Is that country an up and down country through there?
A. Yes, sir; yes, sir; very hilly.
Q. Was there timber and underbrush when you were stepping there?
A. No, sir; very open; no underbrush whatever.
Q. You didn't have to go around any rocks or trees or brushes—anything of that kind?
A. Yes, sir; I might have had to go around a few trees; but that wouldn't throw me out because I had a section line to run on.
681 Q. Do you mean you were going by the blazes?
A. Well I was going by the blazes and running the compass also.
Q. Were you going by the blazes or the compass?
A. I was going by the blazes.
Q. By the blazes?
A. Yes, sir, and the compass also when I couldn't see a blaze.
Q. Now was it rocky stepping along there, up and down there?
A. No; it wasn't rocky until we started around south of the Hudson claim down through the ravine where that creek is. It is very rocky down through there.
Q. Was it?
A. Yes, sir.
Q. Is that country a farming country?
A. No; it is a grazing country.
Q. Is it a farming country?
A. No, sir.
Q. It is not? You couldn't farm it at all, could you?
A. No; I don't think you could.
Q. You say you don't think you could?
A. No, sir; I say I don't think they could.
Q. Why? Too steep and rocky?
A. Well, it isn't too steep and rocky, but it would be too hard

to get water on it. You would have to get water on any land in there you would raise anything on.

Q. Its being steep and rocky wouldn't interfere with the cultivation of it? It is level enough to cultivate, is it, and smooth enough?

A. Well, there is parts of it that is; yes.

Q. Well, generally?

A. Well, generally it is hilly and rocky.

682 Q. It is generally hilly and rocky?

A. Yes, sir.

Q. Too hilly and rocky for cultivation as a matter of fact isn't it?

A. Well, not all of it; there is parts of the claim that could be providing circumstances would permit.

Q. How much is there of the Hudson claim is there that could be cultivated successfully.

—. ——.

Q. There is none of it could be cultivated successfully? There is some grass grown the trees and bushes?

A. Yes; there is grass grows pretty much all over the claim.

Q. What kind of grass is it? Is it bunch grass or what they call a pine grass in that country?

A. Well, I don't know the difference. I know there's quite a growth of grass in there, the sheep and cattle seem to eat it, they were eating it all the time we were there.

Q. Do you know what bunch grass is?

A. Yes, sir.

Q. Is that grass in there bunch grass or pine grass?

A. Well, I don't know what pine grass is. I know what bunch grass is. It wasn't bunch grass.

Q. It wasn't bunch grass?

A. No, sir.

Q. Is it a coarse, heavy sward grass that stock don't eat at all except when they are very hungry?

A. Well it didn't seem that way because the stock was in there when we was there.

Q. They were feeding on the brush and little tender grass and herbage that grew right under the trees, but the main body of grass in there they weren't eating that, though?

683 A. Yes, sir; that is what they were eating.

Q. They were eating that grass—sward grass, were they?

A. They seemed to eat it all right; they didn't leave any of it I know.

Q. It was all gone when you were there, was it?

A. Oh, no; not all; they hadn't got all over it when we got there.

Q. How high was the grass?

A. Oh, there was some of it 6 or 8 inches high.

Q. How high was the average of it?

A. About 6 inches I should think.

Q. Now, Minor Lewis, who keeps a saloon over there, and Mr. White, his partner, were from Prineville, weren't they?

A. I don't know anything about that.

Q. Don't you know that they were Prineville people?

A. No, sir; I do not.

Q. Don't you know that that is the reason these Prineville people who came down here went around that place, was because they were Prineville people and they knew them?

—. I never knew anything about that.

Q. Anything about that at all?

A. No, sir.

Q. But that seemed to be the general headquarters for Prineville people?

A. It did during the first trial; yes, sir.

Q. And then afterwards you herded them away from there and herded them down toward the Olympia, didn't you, as many of them as you could?

A. I didn't have anything to do with the herding whatever.

Q. This Cooper conversation—isn't it a fact that what occurred there was in substance that Mr. Cooper spoke to Dr. Gesner
684 and said that the witnesses didn't seem willing to tell what they knew when it was in favor of the defendants, and that Dr. Gesner told him that the reason was because they were afraid that the Government would proceed against them.

A. No, sir; it was just after Campbell Duncan had left the stand I remember distinctly and Campbell Duncan couldn't remember and it was referring to that testimony that they were talking about.

Q. Campbell Duncan could remember everything against the defendants and not a thing in their favor. Wasn't that the fact?

A. No, sir; he didn't seem to remember anything in favor of the government, but anything in favor of the defendants he seemed to remember all about it at that time.

Q. Did you hear Campbell Duncan testify in the other case?

A. Yes, sir; part of it.

Q. In the second trial?

A. First trial.

Q. In the first trial?

A. Yes, sir.

Q. How much of his testimony did you hear?

A. Oh, I heard quite a lot of it. I didn't hear it all.

Q. What part of it—the cross examination or the direct?

A. Yes. I heard a good deal of the cross examination.

Q. Did you hear the direct?

A. Yes, sir; part of it.

Q. What part of it the first or the last?

A. Well I can't just recall. I was in and out of the court-room pretty much all the time at that time.

Q. You were going in and out were you?

A. Yes; I was in and out quite a good deal.

Q. How many times were you in and out during the time Campbell Duncan was testifying?

685 A. I don't know.

COURT: Judge, I don't think that that is material. What was said is material between Dr. Gesner and the other person down there

but what occurred in the court room is not I think—his recollection of what the witness testified to.

Mr. BENNETT: We take an exception, your Honor, and that is all.

Redirect examination:

Q. What was the species of timber, these 6-inch trees that you spoke of?

A. On the Evans claim?

Q. Yes; on the Evans claim?

A. Why, there was some of them that was fir and some of it was a pople—what we call a popple or Balm of Gilead.

Q. Was there any herding of witnesses around the Olympic saloon that you know of, or anywhere else, for the government?

A. No, sir; I never heard of it.

Witness excused.

686 WILLIAM J. MITCHELL, Recalled on part of the Government testified.

Direct examination.

By Mr. HENEY:

Q. Mr. Mitchell, referring to your testimony in regard to a conversation between Dr. Gesner and J. C. Cooper, is that the gentleman sitting there, the third gentleman?

A. Yes, sir, right at the right of——

Mr. BENNETT: I object to that as immaterial and incompetent and not proper rebuttal.

Mr. HENEY: I am going to question him in regard to something Dr. Gesner said as to what the conversation was, and I want to identify the person with whom it was had, merely.

The COURT: That is proper.

Objection overruled. Defendants except.

Q. In that conversation, did Mr. Cooper say "How are you Doc, how are you getting along?" And in reply to that, did Dr. Gesner say, "Slowly dragging along," or that in substance?

A. Yes, I don't recollect exactly the words the Doctor used at the time, but he said——

Mr. BENNETT: We object to his stating what was said. It is not proper way to put the question.

Q. Well, I will give you the whole of the testimony, of Dr. Gesner on that subject and ask you if this is the substance of what occurred there. He says, "How are you Doc, how are you getting along," and the doctor says, "Slowly, those fellows tell all they know." And Dr. Gesner answered, "No, Heney won't let them, he has got a club, holds a club over them." Did that conversation take place or that in substance of effect?

A. No sir.

687 Q. How were the parties located towards each other when the conversation commenced?

A. Why, there are three chairs that set on the north side of the office in the Imperial Hotel, between the cigar stand and the counter, the hotel counter, and the water tank sets between the seats and the counter. I was sitting in the middle seat and Mr. Cooper was sitting in the seat next to the entrance of the saloon, to the bar. That would be towards the cigar case. And Doc was coming along and he was about the cigar case when Mr. Cooper says, "Good morning, Doc." Doc says "Good morning," and he walked over and stood right alongside of him, and they had this conversation, and——

Q. The conversation you have testified about, you mean?

A. Yes, sir.

—. And after the conversation you have testified about you mean?

A. Yes, sir. And after the conversation, Doc sat down on the arm of the chair, or the seat, and put his hand behind Mr. Cooper and whispered to him, and they both got up and went into the bar room.

Excused.

688 Thereupon the government offered the final proofs of Laura Biggs, Mrs. Williamson, Ora F. Parker, Sarah Parker, Robert B. Foster, Laura A. Foster, Josiah Hinkle, Chas. Graves and Monia Graves.

Each of which was similar to the ones already hereinbefore set forth and each of which was admitted in evidence subject to the same objection and exception hereinbefore set forth. The court ruling that the indictment covered perjury in the matter of the final proofs and that testimony as to such final proofs was competent to sustain such indictment, to which ruling the defendants then and there excepted and their exception was allowed.

After the Government had rested its case, the defendants each moved separately for the striking out of all of the testimony in relation to the final proofs as incompetent, immaterial and variant from the indictment, but the court refused said motions, and each of the defendants excepted and their exception was allowed.

689 V. GESNER, a witness called on behalf of the defendants, being first duly sworn testified as follows:

Direct examination.

Questions by Mr. WILSON:

—. You are one of the defendants in this case, are you, Dr.?

A. Yes, sir.

Q. Where do you reside?

A. Prineville.

Q. How long have you lived there?

A. It has been about 25 years since I went there.

Q. What business have you been engaged in during that time?

A. I was practicing medicine there until about six years ago. My health failed me and I went to California, and was down there about

two years. I came back and was engaged in the stock business. Ranching and stock business.

Q. Where were you born Doctor?

A. I was born at Salem.

Q. When?

A. 1852.

Q. And where did you live from that time up to the time of going to Crook County?

A. I lived at Salem.

Q. And what business were you engaged in after you commenced business in Salem, or did you go to Prineville immediately upon being admitted as a practitioner?

A. I was farming and going to school there until I went to college. I have been practicing medicine.

Q. What school did you attend?

A. I attended Willamette University; public school and Willamette University.

690 Q. You have lived in Oregon all of your life except the short time you spent in California that you have already mentioned?

A. I was in the east two winters at school.

Q. Some medical school?

A. Yes sir.

Q. What one?

A. I was in Philadelphia the winter of 1882, and then I was in Chicago in 1896.

Q. After going back from California to Crook County, you say you engaged in the stock business; were you alone or with somebody?

A. I was with somebody.

Q. Whom?

A. I was with Mr. Williamson and Wakefield.

Q. Were you engaged in the stock business at all prior to going in with Williamson and Wakefield?

A. I bought one bunch of sheep; that is Mr. Williamson and Mr. Wakefield and I bought one bunch of sheep and they were running that bunch of sheep.

Q. When was that?

A. That was in the fall of 1900.

Q. When did you buy into the firm of Williamson & Wakefield, if at all?

A. I bought in in the fall of 1901.

Q. In the fall of 1901?

A. Yes.

Q. During the year 1902, who was managing the firm business out there?

A. Well Mr. Wakefield was looking after the sheep, and I was looking after the other business—ranching.

Q. Where was Mr. Williamson?

A. He was in The Dalles or out on the campaign, political campaign.

691 Q. To what was he giving his attention during that year of 1902?

A. Politics.

Q. Where was Mr. Williamson's family?

A. They were in The Dalles.

Q. Will you explain to the jury, Doctor, how you run your sheep up there, as to summer and winter range?

A. We run in the timber in the summer and out on the desert of a winter, open ground of a winter.

Q. How far is your winter range from your summer range?

A. Oh it is 30 or 40 miles, I guess, the way they have to go.

Q. The way they have to go?

A. Yes the way they go; somewheres between 30 and 40; about that distance.

Q. Where did you put up your feed? At your summer or winter range?

A. Summer range.

Q. You put up your feed there?

A. Yes sir. Our winter range I should say.

Q. And the sheep are fed during the winter if at all, are they?

A. Yes when necessary.

Q. Where was your summer range for the year 1902?

A. It was up in what they call the Horse Heaven country?

Q. Where is that with reference to Prineville?

A. It is about 20 miles east of Prineville.

Q. Did you have any deeded land in that vicinity?

A. Yes sir.

Q. Have you any leased land?

A. Yes sir.

Q. And also run your sheep on the Government Domain?

A. Yes sir.

Q. What was the general condition of affairs relative to the range and any troubles that there may have been in the spring of 1902?

A. Well there was considerable trouble in the spring of 1902. The fact is, there has been trouble there ever since I think 1896 in that country. I think it started in John Day, South Fork of

692 the John Day, killing sheep on the range, and that spring of 1902 there was a man by the name of Kootman lost, I don't know, quite a number, 150 or 200, such a matter; I don't remember just the number. And Knox lost a lot of sheep on the John Day, and a man named Circle, and that was in 1896 I think, or 1897, lost a lot of sheep, and Col. Nye lost a lot of sheep, and Shaw and Devine had sheep shot and Fred Smith, and I think that was along in 1896 or 1897—along there sometime.

Q. How were these sheep killed, as a general thing?

A. Well they were shot.

Q. The day or night or when?

A. Generally at night; sometimes they went in the day time.

Q. Do you know what was done with the herders in the meantime, while they were shooting?

Mr. HENEY: I will object to this as hearsay.

Mr. BENNETT: I think this is information in relation to it, in 1902, the information that he had. This is all important only as bearing upon the explanation of what was being done there in relation to this land, and the information that he had, whether true or false, at that time.

Mr. HENEY: All right, we will withdraw the objection, if that is the purpose of it.

COURT: Just state generally the information Dr. Gesner, omitting the details. Really I question the competency of the details; just the bare information I think.

Mr. BENNETT: Yes, just the general information.

A. What is the question again Mr. Wilson?

Q. What is your information as to what was done with the herders while the sheep were being shot?

A. Why they generally took the herder and tied him and blindfolded him and tied him to a tree; I think they generally tied him to
693 a tree; two or three armed men would go to him and take him and tie him to a tree; tie him up.

Q. Now you may state whether any threats were made to you, or any suggestions concerning the use of land that you had under lease from outsiders?

A. I was in California during the winter of 1902——

Q. During the winter of what?

A. 1902. That is part of the winter of 1901, I should say and 1902.

Q. Now I am calling your attention to the spring of 1902, what was your information about that at that time?

A. Well I came up from California along in February or March, and I was sitting one night in Mr. White & Combs' saloon reading, and a gentleman came in and commenced talking to me and he wanted some land up there that we had leased.

Mr. HENEY: I object unless you tell the gentleman's name.

Mr. BENNETT: I submit your Honor, that he has a right to tell this in his own way, and then if Mr. Heney wants to ask the gentleman's name, why he can ask it.

Mr. HENEY: Now this is given in the nature of a threat, of an outside party, and he doesn't name the party.

Mr. BENNETT: I submit that this is a matter of cross-examination. If Mr. Heney wants to draw out the name of the party, he has a right I suppose. We don't care to drag in these outside parties unless it is necessary; there is trouble enough in that country. We don't care to drag in these outside parties, if they want to drag them in let them do it.

Mr. HENEY: All right go ahead and we will do the dragging.

A. Well, I told him that we couldn't give that land up; we needed it, and he says "I don't know whether I will allow you"
694 "whether we will allow you to use it or not this summer."

And probably some ten days or two weeks afterwards, I met another gentleman there in town—it was between the Bank and

drug store, Mr. Winnocks drug store, and he says to me, he says "We want you to give up some of that land up there." He says, "If you don't," he says, "you will be injured." I made a reply, I says "I don't know nothing about that range. I have never been up there; don't know anything about it, and Mr. Williamson will be there in some ten days or two weeks, such a matter. You can talk the matter over with him." And when Mr. Williamson came up the gentleman was in town, came to town and I met him on the street, and we walked up to Mr. Williamson's room and he said the cattle men in that section in Horse Heaven, had met him and put him in as spokesman and that they wanted us to give up some of that land we had up there leased and then Williamson made the reply to him, he said "What have you got to give in place of it?" and they didn't have anything. We told them that we had to live as well as they; they had stock and we had stock; we all have to have grass. I think that was probably the sum and substance of it.

Q. What land was referred to by these men?

A. Well, some land on Horse Heaven.

Q. Was it specially described by them?

A. Why, I don't remember, Mr. Wilson, whether it was or not. I couldn't say for certain; it might have been and might not, but I am under the impression it wasn't.

Q. Did you have land leased in the Horse Heaven country?

A. Yes sir.

Q. How was it situated with reference to the Horse Heaven Creek?

A. Well, the Horse Heaven Creek run through it, through one section and one section it didn't.

Q. How is that?

A. The Horse Heaven run through one section and the other section was off of the Horse Heaven; the Horse Heaven didn't touch it.

Q. Which side of Horse Heaven did the section lay that the creek didn't touch?

695 A. It lay on the east side.

Q. Did you have any section rented on the west side?

A. Yes sir.

Q. Do you remember what section it was that lay on the east side of Horse Heaven?

A. Why, I think section 1; township 16, I think, 19.

Q. What was the number of section, did you say, Doctor?

A. Section 1.

Q. Section 1?

A. Yes, 16-19.

Q. Do you remember the number of the section that you had leased there, through which the creek run?

A. Section 35.

Q. What township and range?

A. 15-19.

Q. Do you remember how many sections you had leased in there?

A. No, I do not; had several, but I don't remember in that township.

Q. The odd sections in 15-19 belonged to whom in that country?
A. They belonged to the Willamette Valley & Cascade Mountain Wagon Road Company.
Q. Do you know in whose name the legal title is possessed?
A. I think Charles Altschul.
Q. Where does Mr. Altschul live?
A. I think San Francisco.
Q. You may state what the fact is as to whether the cattle men or the lawless men among them indicated or recognized the right of Altschul or his tenants in the same way that they do the rights of a person who holds land obtained from the Government in another way.
A. No, sir—not—they don't recognize it as much as they do.
Q. Do you know why not?
A. Well, they have gotten the impression that the Com-
696 pany got their lands through fraudulent means, and they don't recognize it on that account, sir.
Q. How are these men referred to in that country who shoot sheep? What is the title that they go by?
A. They call them 30-30 men; sheep shooters.
Q. In the spring and summer of 1902, you may state whether any notices were posted on any land that you held in that section?
A. There was notice on some of the land yes.
Q. What was the purport of those notices?
A. 'No sheep allowed on the land.'
Q. Anything further than that?
A. Well, signed 'Committee.'
Q. Was this land that you are talking about where your summer range was, near settlements?
A. No sir, there is no settlement within five or six miles.
Q. How is it as to being covered with timber or otherwise?
A. It is pretty heavily timbered, most of it.
Q. Doctor, considerable has been said here, in this case about your loaning money on timber claims in the year 1902? I would like to have you tell the jury why you did that?
A. Well, the range trouble there was quite acute that summer; a good deal of talking about shooting sheep and so on and so forth. In fact we had some sheep killed and as they didn't recognize the legal title of the land company to most of that land, especially where it was isolated, why, I concluded to loan these people some money in order to protect myself, my property from destruction. And the Federal authorities, the State authorities took no action in regard to suppressing this violence, mob violence, destruction of property.
Q. How did you think that you were going to protect yourself?
A. Well, these people would recognize private individuals where they wouldn't the Road Company's land; they would recog-
697 nize private individuals' ownership, and the Road Company they wouldn't to a certain extent.
Q. And what did you propose to do with reference to loaning money?
A. I proposed to loan these people money; loan some money and take a mortgage on the claim—note and mortgage—and give them

the use of the money for the privilege of grazing on there, as long as they had my money, give me that privilege.

Q. Now, did you have any understanding with anybody, with any timber claimants that he was to sell the land to you when he acquired title?

A. I did not; no sir.

Q. Now, what was the whole arrangement as far as you understood it?

A. These people when they would come to me, and ask me about land—timber, I told them, I says, "if you want to go up there and take a claim in that neighborhood I will loan you the money and take a mortgage on the land; and you give me the use of the grass, for the use of the money, and when you get a Patent to that land, if you want to sell it," I says, "It is worth $500 to me at least, $500 to me." That is about all that was said in regard to it. It was all that was said in the matter.

Q. Did you ever state to anyone of these claimants whether or not you could make a contract?

A. I told them I could make no contract in regard to buying that land, nor they couldn't with me.

Q. Now, Doctor, you may tell the jury how you knew that you could not make a contract; how you discovered that.

A. Well, I had talked with Mr. Biggs about it; talked with Mr. Barnes, both, Barnes afterwards.

Q. You may tell the jury what advice you received and what you said to Mr. Biggs? In the first place Mr. Biggs—was he admitted to the bar? And a practicing attorney there?

A. He was.

Q. And a reputable attorney?

A. Yes sir.

Q. Now, what did you tell Mr. Biggs, and what did he say to you with reference to this matter?

698 A. I told Mr. Biggs the conditions that existed up in that country, and I told him that I had a notion to loan some money on some timber claims to protect myself there, on my property, and I wanted to know how I should go at it legally. I wanted to know if I could loan money on those claims and take a note and mortgage; if that would be legal; if that would be all right; he says, "Yes you can do that," but he went on and told me, "you can not make any contract in regard to buying those lands, nor neither can the people who are selling them, make any contracts in regard to it." I think I asked him if a man could intimate about what the lands were worth up there.

Q. What is that?

A. I asked him if a man could intimate what lands were worth up there and he said yes a man could intimate what lands were worth.

Q. You may state whether or not Mr. Biggs, in that conversation, asked you anything about what the claims were worth?

A. Why, I think he did. I wouldn't be sure.

Q. And what answer did you make?

A. I think I told him if they had a deed to them and wanted to sell them they would be worth at least $500.

Q. I will ask you, doctor, whether you believed what Biggs told you was the law, at that time?

A. I did, yes sir.

Q. Now did you undertake to act on that advice?

A. No, not altogether; I was talking to Mr. Barnes afterwards, about I met him on the street and I had about the same conversation with him, that I did with Mr. Biggs.

Q. Which one did you talk with first?

A. I talked with Mr. Biggs.

Q. Well, you may state to the jury whether you believed the advice that Mr. Barnes gave you was the law, also?

A. I did.

Q. You may state whether the two men agreed, as you understood them?

A. Yes sir; they agreed upon it.

699 Q. I will ask you doctor, if ever you did at any subsequent time, subsequent to receiving the advice of the attorneys relative to these timber claims, whether you ever thought that you were acting within the law as announced by them, or violating the law.

A. I thought I was acting within the law.

Q. And what was your intention at all times?

A. To keep within the law all the time.

Q. You may state to the jury whether you and Mr. Biggs and Mr. Williamson or other persons or you and anybody at any time agreed together to procure people to swear falsely to timber claims?

A. I did not, no sir.

Q. Or to final proofs?

A. I did not.

Q. You may state whether any such thing was ever suggested or not?

A. It was not.

Q. You may state whether or not you agreed together, you with any other person at any time to procure anyone else to do anything that was unlawful as you understood it.

A. I did not no sir.

Q. Or to do anything that was unlawful yourself?

A. No sir.

Q. You may state, Doctor, what your own opinion was at the time you were acting during the year 1902, as to whether what you were doing with reference to these timber claims was honest and lawful, or otherwise.

A. I thought it was lawful and perfectly legal, the whole transaction.

Q. If you had not thought so what then?

A. I would have had nothing to have done with it at all.

Q. You talked with Biggs, you say, more than once?

A. Yes sir, I talked with Biggs a couple of times in regard to the matter.

Q. What was the occasion of your talking with him the second time?

700 A. Well, I met him on the street and I was talking to him about it and he told me, he says "I will look it up for you and be sure I am right." So he went to the office and looked it up and I talked with him again in regard to it.

Q. And in his second conversation did he refer to his first one in any way, or did he refer to the advice that he had already given you?

A. Why, I think he told me that the advice he had already given me was correct.

Q. At the time that you had this talk with Mr. Biggs and received his advice you may state to the jury whether you knew, as a matter of fact what the timber claimants had to swear to?

A. I did not; I never had taken up a timber claim; I never had taken up a homestead or had anything to do with any land in any shape or form.

Q. You may state to the jury whether you at any time suggested to any timber claimant what he should swear to?

A. I never did.

Q. You may state whether or not you ever asked Mr. Biggs to make such a suggestion.

A. No sir I never did.

Q. To tell them what your understanding was, as to whether any person was to make any suggestion to any person to swear to something that was false?

A. I never did, no sir.

Q. Who, if anybody, was to make the notes and mortgages that you have mentioned?

A. Why Mr. Biggs was to make the notes and mortgages out.

Q. And did he make out whatever notes and mortgages were subsequently drawn by the timber claimants to you?

A. Yes sir.

Q. In your talk with Mr. Biggs, you may state whether you

701 said anything about the firm or not?

A. No sir, I never did mention the firm at all.

Q. Now you bought into that firm when?

A. In the fall of 1901.

Q. In the fall of 1901; and you owned what interest?

A. I owned one-third interest.

Q. In all of the property, real and personal?

A. Yes sir.

Q. As a matter of fact, Doctor, when these loans were made in whose interest were they made?

A. They were made in the interest of the company.

Q. You understood it to be a firm loan?

A. A firm loan, yes sir.

Q. But when you talked to Biggs you talked about yourself?

A. I talked about myself entirely. The firm name never was mentioned.

Q. You have stated you intimated what the land was worth to

some of these claimants, I will ask you whether you had any authority as a member of that firm to buy land?

A. I had not.

Q. If these lands had got to patent you may state to the jury whether you would have had any right to have bought any of them for the firm?

A. Not without the consent of the firm.

Q. You may state to the jury whether you had ever had any talk during the time these filings and final proofs were made?

A. No sir we never had.

Q. With Mr. Williamson as to any offers or suggestions that you may have made to the different claimants as to the value of the land?

A. No sir, I never did.

Q. You may state whether Mr. Williamson knew that loans were being made?

A. He knew that loans were being made only.

Q. Mr. Williamson understood you were loaning money to
702 these people and taking notes, and the grazing privilege was to stand off the interest?

A. Yes sir.

Q. Doctor, if it had ever occurred to you that any of these timber claimants in acquiring title to the land would be swearing falsely, what would have been your course?

A. I would have had nothing to have done with it.

Q. I will ask you if these talks that you have rehearsed and the advice you received from Mr. Biggs and Mr. Burns preceded or followed the first filings that were made where you were to loan money?

A. It was before the first filings.

Q. You took the advice from the attorneys before you proceeded to talk?

A. Yes sir.

Q. You may state whether or not you talked with any of these timber claimants about loaning money to them before you received the advice of the attorneys?

A. I don't think I did.

Q. Do you remember the time or the occasion of Campbell Duncan and Green Beard being up there at the shearing plant?

A. I do.

Q. Who else was there?

A. There was Mr. Duncan and his wife and Green Beard and his wife, Frank Ray and his wife and Charlie Graves and a man by the name of Branton.

Q. Is this man Branton the same man who has testified?

A. Yes sir.

Q. And the same man that Campbell Duncan testified was up there with them?

A. Yes sir.

Q. What relation is Ray to Duncan?

A. He is no relation that I know of. Ray is a son-in-law of Green Beard.

Q. Ray is a son-in-law of Green Beard; well was Green Beard present there?

703 A. Yes sir.

Q. Duncan has he a son-in-law?

A. Not that I know of.

Q. Now do you remember Doctor, a conversation that was had there?

A. I do.

Q. I wish you would give the jury your understanding of that conversation, and give as near as you can what was said?

A. If I remember right it was at the noon hour; we were eating dinner there, just after dinner. We all sat around there and Mr. Duncan and his wife—or, I don't think the women were there, nobody but the men—Duncan and Ray and Beard and Branton, and Beard says to me, "What about this timber?" He wanted to know if I would buy the claims up there if they would take them up. I said no, I could not buy the claims; I could not make any contract to buy any claims at all nor that they could not make any contract to sell their claims, but I told them, I said: "If you people want to take claims up here I will loan you the money and take a mortgage on your land a note and mortgage, and you can have the use of that money and give me the use of the range and after you get deed to your land if you want to sell it the land will be worth at least $500 to me. I think that was about all that was said in regard to it. There might have been something said in regard to the length of time I told them they could have all the time they wanted on the money; but I am satisfied there was nothing said in regard to the length of time the mortgages, notes, or anything should run, what length of time but I just simply said they could have all the time they wanted.

Q. Now you may state to the jury whether, at the close of that conversation, or at all, you said to Green Beard or any of them that you would furnish the money to prove up on and that after you got the title you would pay the balance, and ask them if they were satisfied, or if he was satisfied?

A. No sir I never said any such thing.

704 Q. When did you first hear that any claim of that sort was made; like I have just stated?

A. I never heard it until this last trial; heard it on the witness stand.

(JUROR:)

Q. The present trial you mean?

A. The present trial, yes sir.

Q. You have referred, doctor, to the shearing plant, a great many of them have referred to the shearing plant; what do you mean by that?

A. Well it is the place where we shear our sheep of a spring. We frequently make it the headquarters in the summer for the packers.

Q. Shear them by machinery?

A. Yes sir, part of the time.

Q. Now about Green Beard's claim; do you remember how it was that he took his claim there?

A. Why I think I told him where it was, to go and look at it.

Q. Did you give any of them the descriptions?

A. I gave them the numbers.

Q. You mean by the numbers, the township and range?

A. Yes sir.

Q. And the subdivision of the sections?

A. Yes sir.

Q. Well that is the description is it, of the land?

A. Yes sir.

Q. Now did he go to look at it?

A. I think so.

Q. You have stated that Graves was there. Did he hear any part of the conversation? Was he present at that time?

A. I could not say; I don't know whether he was.

Q. Now in your talk there doctor, to these people what was your understanding as to their right to sell to others or whether they bound themselves in any way to sell to you when they should acquire title, if they did?

705 A. Why I considered they had a right to sell to whoever they pleased. I did not consider they were under any obligations to sell to me if they could get more from somebody else, or as much.

Q. Did you understand that they undertook to obligate themselves to sell to you, or to any particular person?

A. I never did, no.

Q. Did you make any reference to a written contract and specify that or say anything about a writing?

A. No, nothing said about a written contract.

Q. If you refer to a contract you may state whether or not you refer to any kind of an agreement.

A. I refer to any kind of an agreement whatever.

Q. And that was your understanding was it?

A. That was my understanding.

Q. That they could not make any kind of an agreement and you could not?

A. No sir.

Q. You may state whether you referred to the fact that you had received the advice of counsel?

A. I think I did yes sir.

Q. You may state whether or not you told the persons then present to whom you had this talk what the purpose of the mortgage was?

A. I think so.

Q. And what did you tell them?

A. I told them to secure me my money.

Q. Was there anything said that the mortgage was made merely to make it look right?

A. Nothing said no sir.

Q. As a matter of fact what was the mortgage to be given for?

A. Simply to secure my money, the loan.

Q. If the several claimants had filed on these claims in accordance with the understanding which you had with reference
706 to the loan of the money would the mortgage ever have increased any in size?

A. Never would, no.

Q. Was Mr. Williamson present during this talk with Campbell Duncan?

A. No sir.

Q. Do you remember who next came up to the shearing-plant?

A. No, I do not think I can recollect who did come next.

Q. Well, do you remember Watkins being there?

A. Watkins, he was not at the shearing-plant.

Q. Well, up to the timber?

A. Yes sir.

Q. Was he the next man up there to the timber after Duncan?

A. I think so.

Q. Who was with him?

A. Why there was Watkins, and his wife and Crain and his wife, and a man by the name of Gaylord.

Q. What relations is Crain to Watkins?

A. He is a son-in-law.

Q. Any of their wives along?

A. Both, and their wives, yes sir.

Q. That is all, Watkins and his wife and Crain and his wife, and Mr. Gaylord was alone, or with them without any wife, if he has got one?

A. Yes sir.

Q. Now before Watkins and Crain and Gaylord came up to the timber you may state to the jury whether you had any talk with them at all?

A. I never had any.

Q. How was it with Duncan and those people that were with him, had you had any talk with them?

A. I never had.

Q. Now referring to the time when Mr. Watkins, Crain and Gaylord came up to the timber, you may state what was said and done with reference to this matter under consideration?

707 A. Why, I think we were taking dinner that day and they came up there and I think they said they came up to take up timber claims, and we told them that they were right in the center of the section, about as good timber as there was in that country, or in that vicinity out there, as good timber, and they could look at that. I told them they could look at that section and if they liked it and wanted to file on it for them to do so, and in regard to Mr. Gaylord, I think he spoke up and said he wanted to file on one and I told him where there was a claim back somewhere else where he could find it, and they got the numbers of the claims.

Q. You may state whether or not anything was said there at that time about your loaning any of these people any money?

A. Nothing said.

Q. Or anybody else loaning them any money?

A. Nothing said in regard to money at all.

Q. Now when did you ever have any talk with Watkins about loaning money to him; before or after making final proof?

A. I would not be sure but I think it was before; he was talking to me but I would not be sure about that. I think I told Mr. Watkins—we were talking about it—that I did not want to carry those other people. I would not be sure; I know Watkins was talking to me about carrying them himself.

Q. When was it that you loaned Watkins, if you did loan him any money before or after making final proof?

A. Some time afterwards.

Q. Was he furnishing his own money?

A. Furnishing his own money.

Q. And you don't remember whether or not he ever talked with you about the loan before or after final proof?

A. No, sir, I don't, I am not certain.

Q. Now how is it at the time of making his sworn statement; at that time had he ever talked with you about it?

708 A. He never had.

Q. Do you remember how many months after he proved up that you loaned the money?

A. No sir, I don't but it was quite a while afterwards.

Q. Now what is your best recollection as to the time when you first talked with him about loaning him money, as to whether it was before or after he proved up?

A. Why I think it was afterwards, I would not be sure; I think it was after he proved up.

Q. Do you remember Mr. Williamson being present at the time Watkins was there?

A. Yes sir.

Q. You may state whether or not Mr. Williamson took any part in what was done up there at the timber that time?

A. Why I don't think he did. They were all talking there. There was something said—I have a faint recollection, but whether it is right or not I could not say now—but I think the way it came up Watkins told me to write the numbers down in his book and I took the book and was going to write them down and Mr. Williamson says: "You better let me write those or they can't read them after they get cold." That is the recollection I have.

Q. Had you forgotten that circumstance until it was called to your attention?

A. I had forgotten it, yes sir.

Q. You may state to the jury whether or not Mr. Williamson was ever present at any time when you talked with any of these claimants with reference to loaning money?

A. He never was.

Q. When Watkins left up there you did not know anything about your proposition that you might loan him some money or whether you would or not on his claim, did you?

A. No sir, I knew nothing about it.

709 Q. Did you ever have any talk with Crain and Gaylord about loaning them money?

A. No, I never did.

Q. Did you ever tell them that you would not?

A. Why, I don't think so, Mr. Wilson, I would not be sure.

Q. Did they relinquish?

A. Yes they relinquished.

Q. Do you know why?

A. Why, I do not think they could get the money, was the reason, to prove up on.

Q. Do you know whether Crain expected to get the money from his father-in-law or not? Mr. Watkins?

A. I think he was figuring on that.

Q. Did you have any talk with Mr. Watkins about relinquishing, about Mr. Crain or about his wife relinquishing?

A. Why, I don't know whether I did or not Mr. Wilson.

Q. Consequently you do not know what you said to him, if you said anything?

A. No I may have had some talk with him, and I may not.

Q. Then you remember absolutely no talk with Gaylord or Crain?

A. No sir.

Q. About loaning money at any time?

A. No I do not.

Q. Well, are you confident that you did not have any?

A. I don't think I had any.

Q. You have testified, I believe, that Mr. Williamson did not know anything about your making any intimation to the several claimants or any of them about what the land would be worth to you?

A. No, sir, he knew nothing about that.

Q. Do you remember when it was that you told him of that?

A. Oh, it was a long time afterwards.

710 Q. In these talks or in the talks that you had at the timber with Duncan and those who were with him, do you remember of anything being said about the profit that there would be in the claim?

A. No, I do not remember anything. There might have been something said that way, but I don't remember of anything.

Q. Do you remember anything being said about how much a claim would cost at the Government price with the fees and other expenses added?

A. No, I don't call it to mind now.

Q. Who is Mr. Graves to whom reference has been made?

A. He is the County Surveyor.

Q. Has he been such County Surveyor more than one term?

A. Yes, he has been County Surveyor a number of years.

Q. A man that has lived in that country for a long time?

A. Yes sir.

Q. Now what were you doing up there when Duncan and those in his party came up? What were you and Mr. Graves doing?

A. We were running out some road land and looking at some timber land incidentally; running this timber land and road land and

establishing the township line, where the township line was. I did not know where any of the leased land was.

Q. Where what was?

A. Our leased land; that is the lines. We were trying to establish those lines.

Q. You had some deeded land up there?

A. It was leased land.

Q. Did you have some deeded land also?

A. Yes sir.

Q. Did you know precisely where that was located?

A. No, I did not, I knew the section.

Q. Well I mean where it was on the face of the earth exactly. A man might know the description of a thing and not know
711 where it was, now that is what I am getting at; whether you knew where your deeded land lay, where the lines of it were upon the face of the earth.

A. No, I didn't know where the lines were.

Q. How many trips did Mr. Graves make up there?

A. He was up there twice.

Q. And when Mr. Duncan was up there, was that during the first or the second trip of Mr. Graves?

A. That was the first trip.

Q. And when Mr. Watkins and his party came up, was that during the first or the second trip?

A. That was the second trip.

Q. Mr. Williamson was present during what trip?

A. The second trip.

Q. What township was it that you were at work in then?

A. 15-19.

Q. You have heard Mr. Duncan testify something about an article in the Oregonian, have you?

A. Yes sir.

Q. What do you remember about that?

A. I don't remember anything about it.

Q. Do you remember his being in the office when you and Mr. Williamson or anybody was reading that article?

A. I don't remember Mr. Duncan being in the office until this spring.

Q. Do you know why Mr. Duncan did not prove up?

A. Why, I told him I did not care to loan him the money.

Q. Did you tell him any reason for it?

A. I told him probably there might be some trouble over it.

Q. Was there any other reason why you did not want to let him have it?

A. One reason was that I was short of money. I expected to sell some property and didn't, and I was short of money.

712 Q. Now what led you to believe that there might possibly be some trouble over it, Doctor?

A. Oh, different newspaper reports.

Q. Anything besides newspaper reports?

A. I don't think so; there might have been talk there; I think there had been some talk—newspaper.

Q. Do you remember Henry Beard's filing?

A. Yes sir.

Q. I wish you would state to the jury what conversation you had with him and whether anyone was present or not?

A. I don't think anyone was present.

Q. What was the substance of the conversation?

A. I think the conversation I had with Mr. Beard was about the same as with all of them.

Q. Tell the jury what it was.

A. I told him if he wanted to file on a piece of land there, why, I would loan him the money to prove up on and take a mortgage on it and as long as he owned that land take the grazing privilege for the interest and as long as he had my money I would charge him no interest.

Q. What was your understanding, that he was under obligation to sell to you?

A. No sir.

Q. That he had made any agreement to sell to you?

A. No sir.

Q. You may state whether or not he ever indicated to you that he thought you had made such an agreement.

A. He never did, no.

Q. You may state whether you knew anything about what he was going to swear to in his final proof, or in his sworn statement?

A. No sir, I knew nothing about it.

Q. State whether you ever made any suggestions to him in any way.

713 A. I never did.

Q. What was your understanding as to whether he had made any agreement with you that would cause him to have to swear to some thing contrary to the truth in proving up or in making his sworn statement?

A. I did not understand it that way.

Q. You have heard Henry Beard testify relative to the comment about a spring on the quarter-section that he was to take up, that he filed upon; what do you remember about that conversation that he says took place up there in the timber?

A. My best recollection of it is that when we came into camp, I might have made the remark, I think I did, that there was a fine body of timber in there, a fine claim, I think that is the only remark I made in regard to it, and I probably said there is a spring, it looks like a spring up there; I did not go to the spring.

Q. What is the fact as to whether it was a fine body of timber?

A. It was a fine body.

Q. Did you say anything about that being useful for range purposes, or not?

A. No, nothing said in regard to range.

Q. What do you say as to whether there was any remark made

to the effect that you must not lose a certain quarter up there that had a spring on it?

A. I don't think there was any such remark made.

Q. Referring to Mr. Gaylord and Mr. Crain, did you pay them back the money they had been out?

A. I did.

Q. Do you remember when they were in the office to get their checks?

A. No sir I don't remember.

Q. Do you remember their being there present together at any time?

A. No, I do not.

714 Q. I will hand you a check that is made payable to the order of Mr. Gaylord and ask you if that check bears the true date?

A. Yes sir.

Q. When was the date on that check written there?

A. On the day that I issued the check.

Q. And is December 9th?

A. December 9th.

Q. Then you gave that to Mr. Gaylord on that date?

A. On December 9th.

Mr. WILSON: It is conceded, I believe that these two ink-blots on the other check got there after they were introduced in evidence.

Mr. HENEY: That is correct.

Mr. WILSON: And by accident some way.

Mr. HENEY: While they were in the possession of the stenographer.

Mr. WILSON: One of the two blots on this check unfortunately happens to hit the date of it.

Q. I hand you a check payable to the order of Mr. Crain; what date did that check bear when it was issued?

A. December 11th.

Q. And was that the true time?

A. Yes sir.

Q. Now judging—refreshing your memory from the date of these two checks—what do you say as to whether you delivered Gaylord and Crain their checks on the same day?

A. I do not think I did.

Q. You may state to the jury whether you recall their ever being in the office together?

A. No, sir, I do not.

Q. Or any time when Williamson was there?

A. I do not.

715 Q. You may state whether or not you remember either of them being present alone when you and Williamson were present?

A. No I do not.

Q. What was the reason that you paid back to these people the amount of their filing and publication fees?

A. I had had the use of the land for the range that summer, the protection of my property, and I thought it nothing more than right that I should reimburse them.

Q. Did you say that to either of them, that you remember?

A. I think so.

Q. You have testified that there was no sort of an understanding between you as to these people selling to you: now I want you to tell the jury whether there was any kind of a secret understanding or tacit arrangement or anything of that sort that they were to sell to you and evade the law?

A. There never was.

Q. Do you remember any talk other than what you have testified to when either Mr. Gaylord or Mr. Crain was present to receive a check?

A. I do not.

Q. Do you remember Harry Hudson or Henry Hudson—I don't know which his name is—talking with you about making a timber claim entry?

A. Why, I remember something about it.

Q. Now you may state whether or not Mr. Williamson or any other person was present at the time he spoke to you about it?

A. No Mr. Williamson nor nobody was present when I was talking with him in regard to it.

Q. And what was it that was said between you?

A. Why, I think we talked twice; I think we had two talks about it.

Q. Which talk was it that you had when you talked about loaning him the money?

A. The first talk.

716 Q. Now what was said at that talk?

A. Why, I told him—we were talking about timber claims; he was talking about taking up a timber claim and I told him, I says: "If you want to go up there in that country and take up a timber claim I will loan you the money to prove up on it and you give me the use of the range while you use my money. I will take a note and mortgage on it, and I think I told him after he got patent to it if he wanted to sell it, it would be worth at least $500 to me."

Q. Now as to Mr. Hudson, what was your understanding, that he made any agreement with you to sell to you?

A. I did not understand it that way.

Q. Well now, did you have any notion that he so understood it.

A. No, I did not.

Q. Did he ever make any intimation to you—you may state whether he did or not—that he thought that there was an agreement between you?

A. No sir.

Q. Did Mr. Hudson finally prove up or not?

A. Yes sir I think so. Yes, he proved up.

Q. Did he ever make any relinquishment to your knowledge?

A. I don't know.

Q. Was there anything between yourself and Mr. Hudson that bound him to sell to you other than there was between you and any other person about whom you have testified?

A. There was none.

Q. I wish you would tell the jury about the entry of Ben Jones. Give it as fully as you can?

A. Ben Jones came to my room; that was before I went up to the shearing-plant, or before I went out the first time and he commenced talking to me about taking a timber claim. He said he heard that I was going to loan some money out there; that I would loan some money, on timber claims, and I told him if he wanted to go
717 up in that country there and take a timber claim that I would loan him the money to prove up on his claim and take a mortgage, a note and mortgage and he could have the use of the money as long as I had the use of the range, and when he got a patent to it if he wanted to sell it that it would be worth at least $500 to me, and I told him I was going up there in a day or two, and when I went up Mr. Jones came up there.

Q. Did you say anything about a contract?

A. I never did, no.

Q. Did you tell him that you could or could not make one?

A. Oh yes, I told him—talking about selling—that I could not make any contract with him to buy it and that he could not make any contract with me to sell it.

Q. Now he has testified something about $75; what do you say about that?

A. I don't remember anything about it; I don't remember having any talk about it.

Q. Was there anything said to him as to how much it cost to prove up?

A. Well there might have been something said in that regard.

Q. Well, do you remember whether there was or not?

A. I would not be sure.

Q. Do you remember any conversation that you had with Christian Feuerhelm?

A. Well, I remember talking to him.

Q. Before I go into that let me go back to Mr. Hudson. The second conversation you had with Mr. Hudson was to what effect?

A. Why I told him if he wanted to file on a claim he could go up to look at the claim and if it suited him he could file on it, and I gave him some numbers; I think I gave him the number of the claim.

Q. And that was all that was said?

A. That was all that was said I think.

Q. Do you remember whether anybody was present or not?
718 A. There was nobody present.

VAN GESNER resumes the stand.

Questions by Mr. WILSON:

Q. There were some ladies, Doctor, who filed upon timber land in the vicinity of the Horse Heaven, did you have any talk with them?
A. No sir.
Q. Do you remember Mr. Evans and Mr. Starr?
A. Yes sir.
Q. In relation to the Evans and the Starr filing or any arrangement that you had with them concerning the land, or the loaning of money, was there anything different from what there was with the other claims?
A. No sir.
Q. None of them had any understanding that he was to transfer the land to you?
A. No sir.
Q. Did you hear Henry Beard testify concerning some marks that were made upon a plat?
A. Yes sir.
Q. That he said was being used in the woods when Graves was surveying, what is the fact about that, about marks being placed upon certain quarter-sections with different indications?
A. I don't remember, Mr. Wilson.
Q. You may state, Doctor, whether you placed upon a plat any such marks yourself?
A. I never did; no.
Q. If they were placed on there, who would they be placed by?
A. Mr. Graves.
Q. And if so placed, do you know what his mark indicated?
A. I do not remember, no.

719 Q. You remember Mr. Elliott, perhaps William Elliott—I don't recall his first name—who testified perhaps, some conversation that he said he had with you?

A. Yes sir.
Q. If you suggested to him that he lease any land where was that land located, that you were talking about?
A. I think the conversation I had with Mr. Elliott was, that I told him they ought to pay me for the leases on that land they were using.
Q. Which is——?
A. On the east side of the Horse Heaven. That is, I think, the conversation I had with him in regard to it; that we wasn't using that land, the cattlemen were using it and they ought to pay me for the use of it.
Q. You have heard one Mitchell testify.
A. Yes sir.
Q. Concerning what he called tampering with witnesses Graves, Foster, and Parkey. I will ask you if you ever talked with any of those witnesses for the purpose of influencing their testimony?
A. I never did.

Q. Did you ever talk with Mr. Parkey about the case at all?

A. I never talked with Mr. Parkey any about the case. I was out to supper one evening and came by, came down the street, and stopped in at Lewis and White's for a moment, and they came in there—Mr. Parkey and I think somebody else, and Parkey was saying something,—said that Burns had given him until tomorrow evening to change his testimony and that is about all that was said. I made some casual remarks.

Q. When was that with reference to the trial—the first or second?

A. Well, that was during this trial.

Q. During this trial, this present trial you mean?

A. During this present trial.

Q. Had you ever talked with him before anything about the case?

720 A. I never have.

Q. How about Foster?

A. Foster? I never talked with him at all about the case.

Q. Mr. Graves is the country Surveyor, is he——

A. Yes sir.

Q. That you have already testified about. You may state to the jury whether you ever said anything to him for the purpose of influencing his testimony?

A. I never did.

Q. You may state to the jury whether you knew what Mr. Graves thought as to whether there was a contract or not concerning the sale of the land?

A. I don't think he thought there was any contract at all.

Q. Well, I was asking if you knew what he thought about it?

A. I knew he thought it was no contract whatever.

Q. Had you ever talked with him any further than that, than you have already indicated, about the case, or heard him express an opinion about it further than that?

A. No, I think not, Mr. Wilson.

Q. You have heard these cruisers talk about the timber and the amount of it upon certain claims that have been described during their testimony?

A. I have.

Q. Now, Doctor, what do you say, generally, about the timber upon such claims as they have testified about?

A. I say the timber on those claims is very good timber. It is what I would call more than an average of a pine timber belt.

Q. What kind of timber is it up there?

A. It is pine and on one claim there is some little fir. Not very much fir, mostly pine.

Q. And it is all pine as far as you know, do you mean to say, except on one claim.

A. Yes; as far as I know.

721 Q. Is there any oak in that country Doctor?

A. No sir; I never saw an oak tree east of the Des Chutes River. I don't think there is an oak tree within a hundred miles of there.

Q. Do you know where the claim of Mrs. Williamson is?
A. I do.
Q. You may state to the jury what kind of timber that is as to quantity and quality?
A. Well, it is very good quality and I should judge on that claim there is something like a million and a half feet of lumber—just rough estimate.
Q. When you say this is good timber in quantity, what do you compare it with?
A. Well I compare it with other timber that I have seen them saw in that country at different saw-mills working and sawing timber.
Q. You may state whether timber of that sort is used by mills.
A. Yes sir.
Q. What do they use the timber for?
A. They use it for all kinds of buildings.
Q. Finishing?
A. Finishing and general building purposes.
Q. Do you know where the claim of Mr. Biggs is?
A. I do.
Q. Now what about that claim as to being a good timber claim?
A. That is a very good timber claim.
Q. How about the quantity as compared with Mrs. Williamson's?
A. Well, I don't think there is very much difference.
Q. Do you know where the Jeff Evans claim is?
A. I do.
Q. What about that?
A. It is a very good claim.
Q. How near is the claim of Evans to a standard parallel.
A. It closes on a standard parallel.
722 Q. How many corners are there to the sections there, north and south of the standard parallel? That is not what I mean to ask, but as to whether the corner of the section that is north of this section 2 is just the same as the corner of section 2?
A. No sir.
Q. Will you explain it to the jury?
A. If I had a piece of paper I can mark it out. I think I have it marked out here now. The standard parallel is a line run through the country to correct other work. Now in running north and closing on that line you pay no attention to these standing parallel corners. You strike that line when you are running north on section 1 there, for example. You set your corner where you strike the line, and that corner there that you set at section 1 is the corner to section 1, the northeast corner, and this corner here is to section 36; these corners here have nothing to do with this.
Q. These sections, you mean those immediately north?
A. Those immediately north.

(Mr. BENNETT:)

Q. The corners of the north and south sections are not the same?

A. No; the corners of the north and south sections are not the same.

(JUROR:)

Q. About how much variation is there?
A. About a quarter of a mile.

(JUROR:)

Q. On that particular line?
A. If I remember right about 150 yards. I wouldn't be sure, but that is my recollection. I think this corner here is about 150 yards west of this standard corner.
Q. What is the fact, doctor, as to whether you intended to locate anybody on a poor timber claim?
A. I did not. I intended to locate them on good claims,
723 good average claim for the country.
Q. There is in evidence doctor, a letter written by you, perhaps to Mr. Feuerhelm, in which you say something about being trouble and that you might have to throw up all of the claims. What did you mean by that?
A. Well, sometime during the summer—these people were locating there in the fall—I got acquainted with I think it was a timber buyer or cruiser—buyer I think, and he was there probably a week; and so about a year after that, a little over, I met him in Portland, and this timber trouble had come up then—so much talk about the timber claims—and we were talking about it and he told me there was going to be a great deal of trouble about this timber business. He says, "You are liable to get into trouble too, about it." He says "You have loaned those people some money, and the Government has got onto it that you have made them offers that you would give so much for a quarter section," and that we were liable to have trouble. So I just concluded I would drop it; have nothing more to do with it; loan no more money on it.
Q. What did you mean by that letter?
A. Well I meant I would loan no more money on those claims.

724 Cross-examination.

Questions by Mr. HENEY:

—. Who was that cruiser you met out there?
A. What is that?
Q. Who is that cruiser you are talking about that you met out there who told you that?
A. I don't know his name.
Q. Has he gone to Mexico?
A. I don't know where he has gone.
Q. When was it that he was talking with you here in Portland?
A. Why I think it was about a year ago; I think in 1904; I think that winter.
Q. Did you hear of the Puter indictment and trial?
A. At that time?
Q. At any time.

A. I heard of the Puter indictment probably a year afterward.
Q. Was it after that that this man was talking to you?
A. I think so yes.
Q. A good deal of talking about getting under cover after that Puter indictment and trial, around the country, wasn't there?
A. I don't know as there was much.
Q. You say that you had regard to the character of the timber upon the claims in selecting them for these people, did you?
A. How is that.
Q. You had regard—you took into consideration the amount of timber that was on the claim; that determined what claims you would select?
A. Yes, sir, I did.
Q. You selected the claim for each one of these did you?
A. Well no, not—I didn't select any of the claims. I told them where they were.
Q. What did you tell them about it?
A. I told them to go and look at them.
725 Q. Didn't you say "this is the one I want you to take if it suits you?"
A. No sir.
Q. What did you say?
A. I says, "You can go and look at that claim; if it suits you, you can file on it."
Q. And if it suited him and he filed on it, you would loan him the money on that claim?
A. Yes sir.
Q. You don't call that selecting the claim for him?
A. Well, they were all at liberty to do as they pleased in regard to filing.
Q. Yes, but you didn't care to loan unless they took the ones you pointed out, did you?
A. Well I never said anything about that; there was nothing said about that.
Q. You told them you would loan if they took one?
A. Well, there was nothing said about if they took another one I would loan or not loan.
Q. You wouldn't have loaned unless you were satisfied with the other one would you?
A. Not unless it had timber on it I wouldn't.
Q. Supposing it had been up there, two townships above, and had timber on it, would you have loaned on it?
A. No sir I wouldn't.
Q. Were you ever on the Ora Parker claim?
A. Ora Parker? I think so.
Q. You selected his didn't you?
A. I think I told him where it was.
Q. You think you selected that for the timber, do you? Is that the timber that you see on Plaintiff's Exhibits 174 and 175,
726 that you were expecting to loan your money on?
A. I don't recognize any of those places, Mr. Heney.

Q. Well isn't over half the claim like that, as it is in that photograph, those two photographs?

A. Not according to my recollection, no sir. I can take and get a thousand photographs like that any place in those mountains.

Q. In that township?

A. On any of those townships; any quarter there; I can get you something similar to that.

Q. Then all those quarters have places that those photographs——

A. Get you vacant spots on any of those.

Q. All those quarters that you have loaned money on for timber, have places on like that?

A. No, I don't say like that. I say you will get vacant spots on them.

Q. Well as big as that?

A. I don't know as big; I couldn't tell nothing about the picture; I know nothing about the picture.

Q. How much of that sort of vacant spots is there on the Ora L. Parker place, according to your recollection?

A. If there is any I don't remember it.

Q. Then your recollection of the claim is not very good, is it?

A. I haven't been there on that claim since we located it.

Q. Since you located it?

A. My recollection is it was a very good timber claim.

Q. Doctor, you had the first talk with the cattleman in March, was it? This talk that you told about with some cattleman?

A. Yes I think it was along in March.

Q. What was his name?

A. Do you want to know his name?

Q. I wouldn't have asked you if I hadn't.

A. His name is Joe Lister.

Q. Did you ever mention his name before in any of these trials?

727 A. I did.

Q. As being the man you talked with in your first talk?

A. Yes sir.

Q. Well who is the man you talked with in your second talk a couple of weeks later, you say you had another talk?

A. With another gentleman yes sir.

Q. Who was that with?

A. With J. H. Gray.

Q. When was the first time you mentioned his name in these trials?

A. The second trial.

Q. You say that Gray told you that he represented cattle men?

A. He represented—he said the cattle men in Horse Heaven had met, and he represented—they had put him in as spokesman.

Q. They had put him in as spokesman?

A. Yes.

Q. And what was it that he wanted?

A. He wanted us to give up some of those lands up there.

Q. What lands?

A. Well on Horse Heaven.
Q. Whereabouts along Horse Heaven?
A. He didn't designate exactly, but land we had leased there.
Q. He didn't designate exactly?
A. No, I don't think that he said exactly what, but it was those lands we had leased on Horse Heaven.
Q. That wasn't the first talk you had had with Gray about giving up some lands to him individually, was it, that you had leased there?
A. That was the first talk I had had with Mr. Gray.
Q. Now doctor, you had these three pieces in 16-19 leased didn't you at one time in 1902, sections 1, 3 and 11?
A. In 1902?
Q. Yes?
A. I don't know Mr. Heney; what township is that in?
728 Q. 16-19.
A. I don't know.
Q. Well didn't you turn over 3 and 11 to Gray?
A. That is a transaction I had nothing to do with.
Q. You didn't have anything to do with that?
A. No.
Q. Who did that?
A. I couldn't tell you; I think Mr. Williamson did that before I went into the sheep business.
Q. And in this talk with Mr. Gray; that you are talking about, didn't Gray tell you that Williamson had agreed at the time he turned over 3 and 11, that the next year he would turn over section 1 to Gray?
A. No sir.
Q. He didn't tell you that?
A. No sir.
Q. Gray was running cattle?
A. Gray was running cattle.
Q. Well now, he kept those cattle under fence didn't he?
A. He had some he kept under fence at that time, and he had a lot he kept on the range at that time.
Q. Didn't he keep them all under fence?
A. No sir.
Q. Didn't he keep them all under fence during the winter?
A. Oh I think he kept them probably in his pasture during the winter.
Q. Yes, and his pasture came right up to the line—to the south line of 15-19, didn't it?
A. I don't know; I think probably it did, close there.
Q. And he wanted that to square out his pasture, didn't he? That section of 1 in 16-19 and isn't that what the talk was about?
A. No sir. No sir.
729 Q. Wasn't he herding his cattle in the summer time a considerable distance away from Horse Heaven?
A. He had some fine cattle I think he was herding; the balance——
Q. Where was he herding?

A. I think up on what they call Little Summit.
Q. How far is Little Summit from Horse Heaven?
A. Well, I think Horse Heaven heads up in there; I have never been up there.
Q. How far is it from the sheep-shearing plant, and in what direction?
A. It is a little northeast; northeast from there; why it must be ten miles or more; somewheres in that neighborhood.
Q. Then it doesn't interfere with your sheep range on the Horse Heaven, does it?
A. No.
Q. Now did you ever attempt to graze your sheep on the Horse Heaven, east side of this section 35?
A. Yes sir. We used to graze there.
Q. Did you graze there?
A. Yes sir.
Q. What years?
A. I think they grazed there about to 1902.
Q. Until 1902. And did they use it in 1902?
A. I think they used it a little while in the spring.
Q. You lambed there that spring, didn't you?
A. We lambed in that vicinity.
Q. There wasn't any objection by any of the cattle men to that, was there?
A. There was notice stuck up there just shortly after that.
Q. Where was the notice stuck up?
A. Stuck up on the house.
Q. What house? The house in 35?
730 A. Yes sir.
Q. On what side of Horse Heaven creek?
A. It is on the east side.
Q. On the east side?
A. Yes.
Q. And the notice was that Horse Heaven Creek was to be the line, was it?
A. The notice was "No sheep allowed."
Q. No sheep on the west side of Horse Heaven Creek?
A. I don't know just what it read. "No sheep on these premises." That is the way it usually read.
Q. Weren't there a number of notices along Horse Heaven Creek? "No sheep on the west side of Horse Heaven Creek?"
A. I never saw them.
Q. You didn't see them?
A. No sir.
Q. Didn't see any? 36 is a school section, isn't it?
A. Yes.
Q. Who owned that in 1902?
A. I think a man by the name of Lucky.
Q. Who owns it now?
A. I couldn't say.
Q. You don't?

A. No sir.
Q. Own any interest in it?
A. No sir.
Q. Have you owned any interest in it since 1902?
A. Never have. Never owned any interest in it at all.
Q. Is it under fence?
A. Yes sir.
Q. Was it under fence in 1902?
A. I think so.
Q. Well there is very little land between Horse Heaven Creek and Section 36, isn't there?
A. Oh there is some land there.

731 Q. Well, that little is all that you had on the west side of Horse Heaven Creek, except section 1, of township 16, wasn't it?

A. I think so, at that time. Yes.
Q. And you hadn't been using section 1, you say of township 16?
A. I don't think we used it that year. No.
Q. Had you used it the year before?
A. I think so. I wouldn't be sure.
Q. You wouldn't be sure?
A. No.
Q. Well, when did you first learn that Morrow and Keenan had 17, at your front door, so to speak, the sheep shearing plant right here?
A. Oh, I didn't learn that until along in the summer.
Q. Along in the summer?
A. Yes.
Q. About how far in the summer?
A. Well I couldn't say Mr. Heney, just how far along; probably July along there somewhere or June.
Q. After those filings had commenced?
A. Yes, I think it was after those filings were made. I wouldn't be sure on that point.
Q. Why wouldn't you be sure Doctor?
A. For the simple reason I don't remember exactly.
Q. You wouldn't be sure whether you learned that before those filings commenced or not?
A. Those filings? I don't know, Mr. Heney for sure.
Q. Well what led you to commence those filings?
A. The threats that we had had up there.
Q. From the cattle men?
A. I don't know where it came from.
Q. Well, supposedly from the cattle men?
A. Supposedly from the cattle men yes.

732 Q. That was all that led you to commence those filings?
A. That was the object of the filings.
Q. Did you know anything about the range up there at that time before you went up with Graves?
A. Oh, I had been up there at the shearing plant.

Q. That is all you knew about it?
A. I had been around there a time or two.
Q. You didn't know the range though, through township 15-19 did you?
A. Oh, I knew the general character of it — is all.
Q. In the most general way?
A. In a general way?
Q. Did you hear that letter of yours of date May 21st, 1902, to C. E. S. Wood read in evidence, where you told him that you wanted certain sections up there, and among them enumerated every one of those that Morrow & Keenan afterwards got?
A. I heard a letter read, but I don't remember the sections.
Q. And you told him in that letter that you didn't know anything about the range, but Mr. Williamson would come in and select which he wanted; that you didn't know whether you would want all of them or not?
A. I think I said something to that effect.
Q. Well, now then, do you mean to say that you don't remember of Williamson going up there and telling you that Wood told him that Morrow & Keenan had all of those sections, 1, 9, 11, 13, 15, 17, 23 and 25?
A. No he never told me that.
Q. He never told you that?
A. No.
Q. Had you heard it before Williamson got up there in June?
A. I had heard—I think I had heard that Morrow & Keenan had applied for them. I wouldn't be sure.
Q. Had you written that to Williamson?
733 A. I don't think so.
Q. You don't think so.
A. No I don't think so.
Q. You don't think when Williamson went to see Wood that he knew that?
A. Which?
Q. That he knew that Morrow & Keenan had been endeavoring to get them?
A. I don't know?
Q. You don't know whether he did or not?
A. I don't know what he knew about it.
Q. Who first told you that Morrow & Keenan had applied for them?
A. Well, I couldn't say Mr. Heney.
Q. Nor you can not say when you first heard it?
A. No, I couldn't say for certain when I first heard that.
Q. You haven't any recollection of Williamson arriving up there on June 14th, at Prineville?
A. No, I don't but he was there.
Q. You haven't any recollection of his being there those nine days?
A. No sir.
Q. Nor of what happened during that time?

A. No, I don't.

Q. Well, what was the date you first went to Biggs, and talked to Biggs about taking up claims?

A. Oh, I don't know. I think it was two or three weeks before any claims were taken up.

Q. It was just about two weeks before the first claims were taken up—that is two weeks before June 30th, or in other words, about the day that Williamson got there, or the day after, wasn't it?

A. Well, I wouldn't say; it might have been two weeks; it might have been three weeks; it might have been a month.

734 Q. You mean to say you didn't talk with Williamson about it at that time?

A. I say if Williamson was up there, we probably talked about it.

Q. Well, did you probably take Williamson to Biggs with you?

A. No sir.

Q. You think you did that alone?

A. I did that alone.

Q. And you think you didn't give Biggs any idea that Williamson knew anything about it?

A. No sir.

Q. No what? You think you did not?

A. I did not.

Q. You think you went and had a talk with Biggs after Williamson arrived and didn't tell Biggs that Williamson knew anything about it?

A. I never told Biggs a thing about anybody but myself; I always spoke in the singular number when I was talking to him about it.

Q. Did you tell Biggs, that these fellows Morrow & Keenan, had butted in there and taken your front door step, and that you wanted to get some way of protecting yourself against them and crowding them back?

A. No sir.

Q. Didn't tell him that?

A. No sir.

Q. You didn't explain to him what the situation was up there?

A. Not further than the cattle situation.

Q. Hadn't Williamson explained to you before you went out there and before you saw Biggs, that Morrow & Keenan had all those sections, including 17, which was right bang up against the shearing plant?

Objected to as unfair to the witness, because it doesn't appear that at that time Morrow & Keenan had those sections, or any of them.

735 Mr. HENEY: It does appear that they applied for them on March 27th, 1902, and that Williamson, by Woods letter, was in there on June 12th, and left on June 12th, complaining because of the fact that they had taken his front door step, and he went direct to Prineville, because he got there on June 14th, as is shown by the testimony of the stage records and hotel, and remained there until June 25th.

Mr. BENNETT: It is true that they had applied for them at that

time; and these people had applied for them after, but they didn't get those sections until long afterwards, according to Mr. Wood's testimony.

Objection overruled.

Q. Before you talked with Biggs now, hadn't Williamson told you that he had learned here in Portland, if he didn't know it before that, that he knew it then at any rate, that he had talked with Wood, and that Wood had told him it was practically settled that Morrow & Keenan were to have those eight sections, and that that included this section 17, right there butting up against this even section in which the shearing plant was?

A. I don't remember any such conversation.

Q. Don't remember any such conversation?

A. No.

Q. And on the first trial of this case, you testified that you didn't remember of Williamson being up there from April until he was up there in July, did you not?

A. I say he was up there either in March or April, and I think he was up there in May, right after the State convention, and I don't remember of him being there until July.

Q. The State Convention was early in April, wasn't it?

A. I don't remember just what time the State Convention was, but I think it was the latter part of April, is my recollection.

Q. He was up there in the last week in April—was the
736 time that dinner was given to him up there, wasn't it?

A. I don't know whether that was April or May; those dates I don't remember.

Q. Didn't you testify that it was April or March he was up there, on the first trial?

A. In what respect?

Q. Well, I will get it for you now, so we will be sure. Isn't this your testimony upon the first trial? I am reading now from Page 10, of the Direct Examination:

"—. About what part of the time was Mr. Williamson up there that summer? A. He was up there in July a little while. Q. Was he up there prior to that or not? A. I don't think he was there. I think he was there in March and then he was there after he was nominated and I don't remember of him there until July. Q. And about how long was he there then? A. Oh, he was there probably ten days or two weeks; such a matter, I don't remember just exactly how long. Just a short time. Q. And when was the first time that you had any conversation with him relative to the loaning of money? A. Well, it was during this trip up there, during that time. Q. During what time? A. In July."

Didn't you so testify on the first trial?

A. Yes sir.

Q. Now, going to the cross-examination weren't these questions asked you and didn't you make these answers:

"—. When Williamson was up there, wasn't he up there in June, the middle of June? A. Williamson? Q. Yes. A. I don't think he was. I don't remember him being there. Q. Didn't he stop at

the Poindexter Hotel on the 15th of June. A. I don't know. He might have been there but I couldn't say. Q. Well, you remember before you went out on that survey you saw Williamson in Prineville, didn't you? A. No, I don't remember. I was trying to think of that—whether he was there or not—but I don't think he was. I don't remember seeing Williamson. He was out there right away after the State Convention and I don't remember seeing him until July. Q. Where did you first see him, out at the timber or at Prineville? A. I saw him in Prineville. Q. Was that before you went out with Graves to survey? A. I had been out with
737 Graves once. Q. You went out again? A. I went out again. Q. Well now then, when was it you had the talk with Williamson about these cattle men having held a meeting and saying that you couldn't run sheep out there? A. That was in March—February or March. Mr. Williamson was absent when one of those gentlemen was talking to me. Q. Did you tell Williamson how you expected to protect the property? A. No. Q. You didn't tell him that? Was he interested with you in these loans? A. It was part of the firm's money."

Do you remember testifying so?

A. Yes sir.

"Q. Did you tell him you were going to make the loans? A. Not until after I had located some of these people. Q. Some of them? A. Yes sir." —. Now the first ones to locate filed June 30th, so that you mean that you told him first after that? A. In July when he was up there. Q. Yes, in July. A. Before I had located the last one. He knew that I was going to make the loan."

That is correct is it?

A. Yes sir.

Q. Now, do you still say you never told Williamson anything about it until he got up in the middle of July?

A. That is the best of my knowledge Mr. Heney.

Q. That is the best of your knowledge?

A. Yes sir.

738 Q. And you have no recollection of Williamson when he got up there on the 14th of June, and from that time until the 25th of June, telling you anything about Morrow & Keenan getting those 8 sections or that they would probably have them?

A. No sir; I don't remember it.

Q. And that didn't have anything to do, then, with your locating people up on those timber claims?

A. That business?

Q. Yes?

A. No sir.

Q. So that you were not endeavoring to get the springs and water so as to crowd Morrow and Keenan off those odd sections that they had leased at your door step?

A. No sir.

Q. And the Jeff Evans claim, how did you come to select the land that he was put on last? He was first up in section 2 in 15-19 wasn't he?

A. I think so.

Mr. BENNETT: We object to the question on the ground that it is not a fair question to the witness; he hasn't stated that he selected that claim.

Q. Why didn't you tell Jeff Evans the one you wanted him to look at up there in section 2 of 15-19?

A. I told him there was some sections there—to go and look at them—some timber there—to go and look at them.

Q. You knew that he went and filed on a claim in section 2, didn't you?

A. Yes.

Q. And that it was changed afterwards?

A. I didn't know when the change was made; I think probably Mr. Biggs spoke to me about it and I told him to see Mr.

739 Evans, and probably referred him to this section.

Q. Who do you think referred him to that section?

A. I think I told Mr. Biggs about it.

Q. You think you told Mr. Biggs about it?

A. Yes sir. I didn't know anything about—had nothing to do with the changing.

Q. Well, do you think Jeff Evans selected that last one for himself?

A. I don't know anything about that.

Q. You don't think you had anything to do with it?

A. No; I think I just mentioned it to Biggs. That is all I know about it.

Q. What do you think you said to Biggs about it?

A. Well, I think I told him, probably, it was pretty good timber down there; if he wanted that he could file on it,—change it.

Q. You think you told him there was pretty good timber down there?

A. Probably.

Q. You thought at that time that a man had to go on a claim before he could file on it didn't you?

A. That was my understanding.

Q. Well, did you think Jeff Evans had been down on that claim that he was transferred to?

A. Why, he could go and look at it.

Q. Do you think he had been?

A. I don't know whether he had or not.

Q. Did you at that time think he had been?

A. He claimed he was all over that country to me.

Q. When did he make that claim?

A. He said he had rode all over it.

Q. When did he make that claim?

A. Well I don't know just when.

740 Q. Well, was it when he was talking to you about filing in the first place?

A. It might have been and might not.

Q. Well what is your best recollection?

A. Well, I don't remember.

Q. What did he go out there at all for the first time if he had been all over it? He didn't have to go at all, did he?

Objected to as incompetent and calling for the conclusion of the witness.

Q. Do you know why?

COURT: He can answer if he knows.

Q. You don't know why?
A. Why, I don't know. I suppose his wife——
Q. Now Doctor, isn't it a fact that you selected that claim yourself when Biggs told you there was somebody else already on the claim up here that had been selected for Evans, didn't you tell Biggs to make the change to this place, so that you would have a connecting link with these two pieces that you had under lease down there? so you could get to them without going off your own land?
A. No sir.
Q. Didn't tell him anything of that kind?
A. No sir.
Q. Didn't you select this piece and tell him that is where you wanted to put him?
A. I think I told him it was a very good timber claim, and if he wanted to file on that it was all right.
Q. How many trees are there on it? Do you think there are more than 39?
A. Yes; I know there is more than 39. There is 339.
Q. That would make merchantable timber?
A. Good merchantable timber.
741 Q. There is a good running stream of water on it isn't there?
A. It runs part of the year.
Q. Most of the year?
A. It dries up in the summer.
Q. What time does it dry up?
A. It sometimes dries up as early as July.
Q. Where do you get the water for these down here—these two down here that you have under lease?
A. Well, sometimes they may be dry in places—some places there may be holes in it.
Q. Oh, you don't mean entirely dry?
A. Not entirely dry.
Q. It stops running and has pools?
A. Has pools; sometimes it runs the year round.
Q. How do you suppose Williamson came to select this and have his wife file on it on July 1st, and that you at the same time selected and had Campbell Duncan and his wife file on these two on June 30th, the day before, if you didn't have any talk with Williamson before he started back to The Dalles on June 25th?

Objected to as calling for the supposition of the witness as to what somebody else——

COURT: He may answer as to his knowledge.

Q. What is your explanation of that if you have any to offer?

A. As I said, we might have talked about it—talked about taking up claims ourselves, and his wife taking one. His wife had been along that road a great many times and knew that claim and she could file on it without coming out there and looking at it.

Q. Then you probably had that in mind?

A. I probably had that in mind,——

Q. When you put Duncan down below it?

A. Yes sir.

Objected to because he hasn't said he put Duncan there.

742 Q. You did put him there didn't you?

A. I told him to look at the land.

Q. Yes; he and his wife. Doctor, in each of these instances you told the person which land to look at and then furnished the money to make final proof, and agreed that you would furnish the money to make final proof, did you not: for Ben F. Jones?

A. Yes, sir.

Q. Nancy D. Jones?

A. Yes, sir.

Q. Aver B. Callavan?

A. Yes, sir.

Q. Joel E. Callavan?

A. Yes, sir.

Q. Charles A. Graves?

A. Yes, sir.

Q. Robert B. Foster?

A. Yes, sir.

Q. Laura A. Foster?

A. Yes, sir.

Q. Ora L. Parker?

A. Yes, sir.

Q. Sarah F. Parker?

A. Yes, sir.

Q. Laura P. Biggs?

A. Yes, sir.

Q. Monia Graves?

A. Yes, sir.

Q. Marion R. Biggs?

A. Yes, sir.

Q. Henry Hudson?

A. Yes, sir.

Q. Christian Feuerhelm?

A. Yes, sir.

Q. Josiah Hinkle?

A. Yes, sir.

Q. Elmer W. Kayler?

A. Yes, sir.

Q. John S. Watkins?

A. Yes, sir.

Q. Henry E. Beard?

A. Yes, sir.
Q. Jefferson D. Evans?
A. Yes, sir.
Q. Jennie D. Picket,
A. Yes, sir.
Q. She is a widow up there isn't she?
A. Yes.
Q. Ernest D. Starr?
A. No, sir.
Q. You don't think you told him which to file on? Oh, you didn't furnish the money?
A. I didn't furnish the money.
Q. You did tell him which claim to file on?

743 A. I told him where the claim was, he could go and look at the claim. He knew that country as well as I did. I told him I thought that was pretty good timber on there.

Q. As to each of these other persons, you told them which claim to look at and told them that you would furnish the money to make final proof, but afterwards, told them to relinquish or sent them word to relinquish, did you not—these that I call?
A. I sent word to them that I wouldn't carry them.
Q. Campbell A. Duncan?
A. Yes, sir.
Q. If you don't want so many of these things in one question I will put less in one question so the witness can't have any possibility of being confused. As to each of these I will ask you if you didn't tell them which piece of land to look at and tell them that you would furnish the money at that time to make the final proof with: Campbell A. Duncan?
A. I told him I would loan him the money.
Q. Yes, loan him the money. Susie M. Duncan?
A. Yes; Susie M. Duncan, I never said anything to her about it.
Q. Green Beard?
A. Yes.
Q. Mary J. Beard?
A. I never said nothing to her about it.
Q. Frank Ray?
A. Yes.
Q. Did you tell Campbell Duncan you would furnish it for his wife? That you would loan the money for his wife?
A. I couldn't say whether I did or not.
Q. Well, you told her which piece to look at?
A. I told them; yes.
Q. And as to Mary J. Beard, did you tell Green Beard you would furnish the money for his wife or loan it to them?
A. Why I couldn't say Mr. Heney; I might have done it.
Q. Tell you, tell her which piece to look at?
A. I didn't tell them any particular piece; I gave them the section.

744 Q. Gave them the section and told them, those four—Green Beard, Mary J. Beard, Frank Ray and Ethie M. Ray to go and look at the section?

A. Go and look at the section.

Q. And you told Green Beard and Frank Ray that you would loan them the money to make proof with?

A. I think so.

Q. And for their wives also?

A. I couldn't say for sure, but probably I did.

745 Q. Ada F. Foster. Did you tell her which piece to look at?

A. I don't recollect her.

Q. She is the daughter of Robert B. Foster?

A. I think she went out to look at a piece. She was there.

Q. Do you remember of meeting Fister and his wife and daughter out there?

A. I remember they were up there.

Q. Don't you remember you were on the way out with Ora Parker and Sarah Parker and Mrs. Biggs and Mrs. Graves, and you met Foster and his wife and daughter going in?

A. I don't remember, but I remember being there when they were there?

Q. Don't you remember meeting them and telling him which one to go and take a look at?

A. I couldn't say for sure but probably I did.

Q. I think you turned back with them?

A. Probably I did.

Q. Turned back with Foster and showed them, took them to the claim?

A. Probably I did; probably told them where the claim was.

Q. You were horseback and rode back and they were in the wagon, and you showed them the claim?

A. I don't remember showing them. I probably told them where the claim was.

Q. You told Foster you would loan them the money, didn't you, for his wife and daughter to prove up on as well as himself?

A. I think I told him for his wife; whether I ever told his daughter she could have the money or not, I could not say.

Q. Didn't you tell Foster afterwards when the time came to prove up just before November 28th, 1902, that you would not furnish the money or loan the money for his daughter, because there were too many in one family?

746 A. I don't remember telling him that.

Q. You won't swear you did not, will you?

A. I would not swear I did or did not, for I don't remember.

Q. Who is Alfred H. Parkey?

A. He is a young fellow working up there.

Q. Herding sheep for you at the time, wasn't he?

A. I think he was working there.

Q. When Wakefield quit you, didn't Parkey quit you and go with Wakefield, and isn't he working for him yet for Ernest Wakefield.

A. I don't know. No, he isn't working for anybody I think.

Q. Who, Parkey?

A. I don't think so.

Q. When Ernest Wakefield dissolved partnership, which was about December 1902, wasn't it?

A. In January 1903.

Q. Didn't Parkey quit working for your firm and go with Ernest Wakefield?

A. I couldn't say.

Q. Haven't you seen him around here with Irwin Wakefield a great deal during this trial?

A. I have seen him here, but I have not seen him with Wakefield that I remember. He might have been with him.

Q. Do you know how Wakefield came to relinquish?

A. No, I don't.

Q. You told Biggs which piece to look at, did you?

A. No.

Q. Marion Biggs?

A. I think the way Biggs took his claim was he said he might file up there if I could get him a good claim in a certain local-

747 ity?

Q. What certain locality; how did he describe it?

A. In and around the shearing plant; said he had been all over there riding, and I think that is the way Biggs came to get his claim if I remember right.

Q. You picked out one for him did you?

A. I told him this quarter that he got was a good claim, I think.

Q. Told him that was about as good timber as there was up there?

A. I told him that was a very fair timber claim.

Q. Did you tell him you would loan him the money to prove up with?

A. I think so, yes.

Q. Told him you would loan his wife money to prove up with too?

A. I think so.

Q. And nothing said about locating the two claims together, so they would be more valuable?

A. No, nothing said about it.

Q. His wife had been up there before that, more than a week before he filed hadn't she?

A. Well, I don't know; I could not say I don't remember whether she was there.

Q. Did you have anything to do with Emmet B. Holman filing?

A. No, sir; I didn't have nothing to do with it.

Q. You didn't tell him which piece he could look at?

A. I don't think I did. I don't think I told him anything about it?

748 Q. Did you give him a check on December 4th, 1902, for $9?

A. No, sir.

Q. Sure of that?

A. Sure of it.

Q. Have you your stub book here?

A. I have a stub book, yes.
Q. For that date?
A. I don't know.
Q. Will you produce it?
A. Sometimes the stubs are dated and sometimes they are not; sometimes I write counter checks.
Q. No dates in this book and you can't tell from this what is the date of the check given to Gaylord nor to Crane can you?
A. No, not from that stub.
Q. He testified that the dates 8 and 11 were placed on those checks of Crane and Gaylord on the day it bears date?
A. I do, to the best of my knowledge.
Q. You are not positive Doctor, as to whether you placed the 9 on that check to Gaylord on the day on which you drew it, are you?
A. Well, I am positive I never placed it there afterwards.
Q. You have no distinct recollection however, about it now, have you, as to whether you drew the check on the same day you dated it or not?
A. I have no independent recollection. I go by the check.
Q. You just go by the check?
A. Yes.
Q. Have you any other checks that were returned to you from the bank about that date? Were these checks you took out
749 about that date? I don't care to see to whom they are drawn but are they about that date?
A. One is December 6th, and the other December 5.
Q. Will you let me see the backs of them?
A. You can see the face of them if you want to.
Q. This is the Green Beard check and the M. R. Biggs check. These are two of the checks we have asked for. I want to call your attention to some holes in these checks. Do you know how they go in there?
A. That is done in the bank when the check goes in the bank they have a sticker there.
Q. They stick it on that punch?
A. Yes.
Q. And this one is the same way?
A. Yes.
Q. Do you know how it comes there is no hole in these checks the Gaylord and Crane checks?
A. Why it seems to me like there is a hole.
Q. Yes, there is; I overlooked it.

Mr. HENEY: I want to offer these two pages of this stub book in evidence.
Mr. BENNETT: It isn't a stub book.
Mr. HENEY: Yes, it takes the place of a stub book. The first two pages are all that bear on this particular thing. That is dated January 6th, 1903, so that these were sometime prior to that.

Q. I suppose that is the Gaylord check?
A. Yes, that is meant for Gaylord.

Mr. HENEY (Reading from the book): Q. W. J. Crane,
750 M. R. Biggs, R. B. Foster and Green Beard; and no date.

Q. Now, this check to M. R. Biggs for $2056.25, signed Williamson Wakefield & Gesner by Gesner, is that Biggs' signature on the back of it, in your opinion?

A. I think so.

Q. What was that given for?

A. I think probably for payment on some of those claims.

Q. That is for Laura A. Foster, Robert B. Foster, Ora L. Parker, Mrs. Parker and Laura P. Biggs, was it not?

A. I couldn't say.

Q. Well, it was for some claims?

A. Yes, sir; I advanced or loaned the money on them.

Q. To make final proof with?

A. Yes.

Mr. HENEY: We will offer that check in evidence.

Q. The Green Beard check was returned for the filing fees I suppose, $19?

A. I think so.

Mr. HENEY: We will offer that in evidence also. The two checks received and marked Plaintiff's Exhibits 191 and 192.

Q. Who was John A. Brown, who made this filing?

A. I think, he was a colored man there.

Q. Worked at the hotel?

A. I think so.

Q. You told him which piece to file on didn't you?

A. I think I told him where he could find the land.

Q. Did you promise to loan him the money to prove up with?

A. I probably did, yes.

Q. John Brown is dead isn't he?

A. John Brown is dead.

751 Q. Monroe Hodges?

A. He is dead also.

Q. Did you tell him which piece to look at?

A. I think so.

Q. Did you promise to loan him the money also, to make final proof?

A. I think I told him he could have it if he wanted it, loan him money if he wanted it?

Q. Sam Hodges is dead also?

A. Yes.

Q. Did you tell him which piece to look at?

A. I think so.

Q. Did you promise to loan him the money to make final proof?

A. I think probably I did.

Q. George M. Gaylord, Wilfred J. Crane; did you tell each of those parties which pieces to look at or to file on?

A. No, I told Gaylord where there was a piece, and Crane was with Watkins and those people. I didn't tell him any particular piece.

Q. Did you tell Gaylord you would loan him the money to prove up with?
A. I don't think I ever did.
Q. And tell Crane that?
A. I don't think so.
Q. Do you say positively you did not, Doctor?
A. The best of my recollection I never did tell him.
Q. Either one of them?
A. Either one of them.

Q. Did you tell Watkins that you would furnish it or loan
752 it to Gaylord and Crane?

A. I don't think so, Mr. Heney.
Q. Didn't you tell him you would loan it to Crane and his wife?
A. I don't think I did. It is something I would not be positive on. According to my recollection I did not.
Q. Did you tell Henry E. Beard which claim to look at?
A. He was right there on the claim.
Q. Before he went over to look at the claim did you tell him you would loan him the money to prove up with?
A. Henry E. Beard?
Q. Yes?
A. Yes sir.
Q. Before he went over to look at the claim, did you tell him you would loan him the money to prove up with?
A. I don't think so; I don't think I had any talk with him.
Q. Did you tell Jeff Evans which claim to look at?
A. I think so.
Q. Did you tell him you would loan the money to prove up on?
A. I think I did.
Q. Did you tell him you would loan him the money for his wife to prove up on?
A. I probably did; I would not be sure of that though.
Q. Adolph Kotzman; did you tell him which one to look at?
A. I think so.
Q. Did you tell him you would loan the money? To prove up with?
A. I think I did; I would not be sure.
Q. And for his wife, also?

A. I probably did; I don't know for sure.

753 Q. Did you tell Chester Starr you would loan him the money?

A. No sir.
Q. Did you tell him which one to look at?
A. No sir; he selected his own claim.
Q. Do you remember surveying up in section 2, Doctor, of 15-19.
A. I remember something about being in there.
Q. Do you remember running the lines up into section 2?
A. Which way, Mr. Heney?
Q. Up north into section 2, above the south line.
A. It seems to me as we did.

Q. What took you away up in there? What were you looking for there?

A. I think probably I was looking for timber, if anything.

Q. Looking for timber?

A. Looking at the timber.

Q. Then you were not running section lines up there to find out where the sections were?

A. Well, I knew where the sections were.

Q. You knew where the sections lines were?

A. Yes sir; found the section corner there.

Q. Did you know where most of the sections lines were?

A. Did I?

Q. Yes?

A. No.

Q. When you went up there you found a spring didn't you in the northern part of section 2?

A. No, there is no spring there in the northern part that I know of. It looked like a spring there in the southern part.

Q. You didn't find any in the northern part?

754 A. No, there is a creek runs through the northern part. There are two creeks run through that section.

Q. Is there water in them?

A. Yes.

Q. How is the grazing up there?

A. Well, I suppose about like all that country.

Q. Do you claim that you did not tell Williamson that you were going to loan money out there until after you had promised some of these people that you would make the loans?

A. Yes, I never told him until after I had promised some of them to make the loans, some of them had filed.

Q. You did not have any money on hand at the time you made the promises, did you, yourself?

A. Why, I think probably I had a little; I don't know.

Q. Did you expect to loan firm money or your own money when you made the promises?

A. I expected to loan firm money, part of it anyway.

Q. You did not have any authority to loan firm money on timber claims did you, without the consent of your partners?

A. I had authority to go ahead and protect my property the best I could.

Q. Did you have any authority to loan money on timber claims without the consent of your partners?

A. Well, I didn't ask them.

Q. Well did you think that you had?

A. I was taking my chances. If he didn't want to, it was all right.

Q. You answered the question very readily that you had no authority to buy timber claims?

A. Well I had no authority to buy.

755 Q. You could have taken a chance on that couldn't you?

A. I could, with my own money.

Q. You could have taken the same chance, using the firm's money, that you could in loaning the firm's money?

A. No, it is a different proposition.

Q. It is a different proposition to loan $425 on a timber claim, to paying $500 for a timber claim. That would be two entirely different propositions, would they?

A. Yes sir.

Q. You think there would be a vast difference in principle between these two transactions?

A. The idea of loaning the money that summer was to protect our property from destruction.

Q. But if you had bought them, it would have been the same idea wouldn't it?

A. It would have been the same idea, yes.

Q. Didn't you think you had as much power to do one as the other?

A. No sir.

Q. You think you could loan $425 on a claim, but that you could not buy a claim for $500?

A. I could not buy them without the consent of the other parties, no sir.

Q. This money was kept in The Dalles bank in your individual name, wasn't it?

A. Yes.

Q. But in July, 1902 you had other business deals in which Williamson was interested with you and in which you kept the money in the bank in your own individual name?

A. In The Dalles?

756 Q. No, at Prineville; a matter involving about $5000.

A. I had some yes.

Q. You did have a transaction of that kind in a matter involving about $5000 where the money was kept in your individual name?

A. Oh, it didn't involve nothing like that.

Q. Didn't it?

A. No sir.

Q. $4800 wasn't it?

A. Oh, no.

Q. Didn't you pay $4800 on School Lands?

A. I don't think so.

Mr. WILSON: I don't see the materiality of these questions. It is admitted it was a firm loan and that the money was kept in his individual name in the bank?

Mr. HENEY: I don't care to go any further with that.

Q. Where is that Allen and La Follette ranch referred to in these anonymous letters, from the shearing plant?

A. One of these ranches is five or six miles, six miles probably and one of them I guess is ten or twelve miles.

Q. In what direction?

A. Northwest.

Q. What was La Follette running on those ranches?

A. He was running sheep up until this last fall.

Q. Was it fenced?
A. Part of it was fenced and part of it was not.
Q. You bought the ranches?
A. No sir.
Q. What did you buy?
A. Didn't buy anything.
757 Q. This anonymous letter refers to your having bought?
A. Refers to having leased them.
Q. What did you do? Lease the ranches.
A. Leased the ranches, yes sir.
Q. What became of the sheep of Allen & La Follette?
A. That letter explains that last fall.
Q. What became of them?
A. They sold them.
Q. Whom did they sell them to?
A. Sold them to some Montana man.
Q. He took them out of there did he?
A. Yes sir.
Q. That didn't scare you off though?
A. I took a chance on it.
Q. You stand better with those sheep shooters than La Follette did don't you?
A. I don't know whether I do or not.
Q. Didn't they promise that they would not molest your sheep?
A. Not until after we had made some line with them.
Q. When was that?
A. When I got that letter. When we received that letter, we told them we was going to take those sheep in there and if they were going to shoot them, they might just as well go to buying their cartridges because those sheep were going in there. And I came to Portland, I takes this letter to Governor Chamberlain, I takes Mr. Edwards and Cartwright, and Wurzweiler and Henry Hahn and Mr. Mills to talk it over with Governor Chamberlain to lay the matter before him.
758 Q. Who were the people you told it to that you were going to take them in there?
A. Different ones.
Q. Who?
A. Generally.
Q. Whom were you talking to?
A. The whole crowd around on the street.
Q. Who were the fellows you thought that wrote that letter?
A. I don't know.
Q. You say you don't know whether you were talking to the men that you thought wrote it or not?
A. No, I don't know whether I was talking to the man that wrote it or not.
Q. Anyway, you went in there?
A. Anyway I went in there.
Q. And you haven't lost any sheep?
A. Well, wait until I go on now. After they found out we was

going in there they came then and wanted to make lines with us and patch it up that way.

Q. Who made lines with you?

A. Why, I think it was—they was riding up there and the cow men talked over the lines I think with Mr. Williamson.

Q. Who was it?

A. I don't know. Mr. Williamson was there. I was down here. He is the one that talked over the matter with them.

Q. So you don't know whom he talked to?

A. Well, I think I know some of them.

Q. Who was it? Sam Smith and Johnnie Combs?

A. No.

Q. Well who?

759 A. I don't know whether it is necessary to bring outside people into this or not. They are neighbors there.

Mr. BENNETT: This is a matter that happened long since and except so far as it explains the leasing of this land or the application they made to Mr. Wood, I presume it cuts no figure in the case, and I don't see why it is necessary to drag a lot of people into this matter, simply for the purpose of getting somebody into trouble.

Objection sustained.

Q. Do you know Mr. Perry?

A. I do.

Q. Did you buy him out?

A. I did; bought his sheep.

Q. He was scared out too, wasn't he?

A. He was scared out.

Q. And you bought him out?

A. Bought him out this spring.

Q. And you still run sheep on his place?

A. No sir.

Q. What did you do with them?

A. I think they are over here in the Cascade Mountains.

Q. You bought the place didn't you?

A. No sir.

Q. What did you buy?

A. Only the sheep.

Q. What did he own there in the way of a place?

A. He has got a ranch or two there; I don't know just what it is.

Q. Going to run those sheep in the Horse Heaven country?

760 A. Not this winter.

Q. You will in the summer?

A. I don't know where I will run them in the summer?

Q. You don't run any sheep up there in the winter do you?

A. No, I don't know where I will run them next summer.

Q. You never lost but four sheep, did you?

A. We lost a few head of sheep and some are crippled.

Q. That was in August, 1902, wasn't it?

A. Sometime during the fore part of the summer.

Q. In August, wasn't it?

A. I couldn't say exactly to the date.

Q. Don't you know it was after these filings?

A. Well, it might have been, and it might have been before. I could not say for certain.

Q. And it was away out here in township 20, over on the east side of township 20, wasn't it?

A. I think it was in township 20 some place; where they had been ranging for years.

Q. Didn't Chester Starr tell you along before the time you mentioned Williamson fixing these lines, that the sheep shooters had promised not to molest your sheep?

A. No sir.

Q. Didn't he tell you that?

A. No sir.

Q. You say that people up there, these cattle men, would not recognize road land, but would recognize an unfenced timber claim?

A. I think so, yes; recognize private ownership.

Q. Well, that is only a think, isn't it? Do you know anything to base it on?

A. Well it has been demonstrated.

761 Q. You think your sheep have been safe since you had these timber claims?

A. I know they have been a great deal safer than they were before.

Q. Although the timber claims were charged by the Government to be fraudulent, they would respect them up there would they?

A. There is Colonel Nye that had sheep on leased land, and his were killed, I think, that same summer.

Q. Where?

A. Right north of us.

Q. What leased land, road land?

A. Road land.

Q. Did anybody ever have sheep killed except those who were on road land?

A. Oh, yes.

Q. Oh, they did.

A. Yes.

Q. When Biggs looked up the timber law for you, did he show you one of these applications?

A. No sir.

Q. Didn't show you that? Didn't show you the law as to what a man had to swear to?

A. I don't think so.

Q. You don't think you ever saw one of these until you got into his office to file yourself?

A. I never did to my recollection.

Q. Now, up there in the timber when you were talking to Branton, didn't you explain to him what it was a man had to swear to?

A. I never did, no sir.

762 Q. Nor to any of those people?
A. No, sir; never explained to anybody because I didn't know.
Q. Now, this $6000 loan was not a firm loan was it?
A. Yes, virtually a firm loan.
Q. It was not signed by the firm name?
A. The firm had no account there.
Q. The note was not signed by the firm name was it?
A. It was to be signed by the firm name.
Q. It was not signed by the firm name was it?
A. It was signed by two of us.
Q. It was not signed by the firm name was it?
A. No, it was not signed by the firm name, but it was to be a firm loan.
Q. Who signed it?
A. I signed it and Mr. Williamson signed it and Mr. Wakefield was to sign it.
Q. Did he sign it?
A. I don't think he did, no.
Q. Why didn't he sign it?
A. Well, he went out—he sold out and didn't sign it.
Q. But he didn't sell out until January and you made the note December 15th?
A. Well, I know.
Q. Why didn't he sign it then?
A. It might not have been for him to sign, but I don't remember that Mr. Heney. I know Mr. Williamson and I signed it and I sent it back. That is my recollection of it. Whether Wakefield was to sign it, I don't remember.
Q. How many mortgages did you take on these lands up there?
763 A. I could not say. I think I aimed to take mortgages on all of them.
Q. Took quite a number did you?
A. Took quite a number.
Q. How soon after getting them did you put them on record?
A. I never put them on record.
Q. You did not put them in record at all?
A. No.
Q. Why not?
A. Because there was no final receipt ever given and the mortgage was no good; rather have the notes.
Q. You did not know that the final receipt was not going to be issued at the time you got the mortgage did you?
A. No.
Q. Were you holding it back until the final receipt would issue for fear it might cause suspicion?
A. No sir, no suspicion, I intended as soon as the final receipt came——
Q. As soon as the final receipts came you intended to put them on record?

A. Yes. I was not holding anything back.

Q. You never heard anybody making a timber filing in 15-19 before you took these first people up there, did you?

A. Now, I could not say, Mr. Heney for sure, but I knew they were filing up in there.

Q. You knew that people were filing up in 15-19 before you took these first claims up there?

A. In that vicinity.

Q. Did you know there was anybody filing in 15-19 before
764 you took those people up there?

A. There was one man working there, or two men.

Q. Who were they?

A. Foster was working in there.

Q. What Foster?

A. I think his name was Adda Foster, and a man named Hinkle was working in that vicinity.

Q. Were they working in 15-19?

A. I think Foster was working in 15-19.

Q. What did he do? Leave in disgust without filing anybody?

A. No sir; he filed a lot of claims.

Q. Whom did he file?

A. I could not say, I suppose he filed in there; there was a lot filed in there.

Q. That was all after you got your first filings in wasn't it?

A. I don't know when it was.

Q. The question is at the time you made these first filings, had you heard anybody was filing in 15-19?

A. I could not say for I don't remember whether anybody was filing or not.

Q. Did you tell Henry Beard that McRae had filed on the piece you wanted him to take and he would have to take another piece and change him to another piece?

A. I don't think so.

Q. Did you tell him McRae had filed at all?

A. I don't think so. I think I told Mr. Biggs or Mr. Biggs spoke to me about it and I told him to see McRae.

Q. Did Biggs tell you who filed?

A. I don't remember.

765 Q. Did you tell Biggs it was McRae?

A. I don't remember ever mentioning any names in regard to it.

Q. Who was McRae?

A. There is a McRae living over there about Antelope I think. I don't know the man.

Q. North of 19?

A. A sheepman living in there, but the map don't show that McRae filed on it.

Q. But didn't you think he had filed on it?

A. No, sir; I don't know who had filed on it.

Q. Do you know who Cady is?

A. He is a timber cruiser.

Q. Where did he live? Prineville?
A. Well, he has been around there for a couple or three years.
Q. Walter A. Cady, timber cruiser?
A. I think so. There is a man named Cady used to cruise up there some.
Q. Live in Prineville?
A. I suppose he did a good deal of the time.
Q. Have a family?
A. The one I know had not.
Q. Do you know Florence Cady and May Cady?
A. I don't know any of the balance of them.
Q. Eunice Smith?
A. I don't know that name.
Q. B. Loren Cady?
A. I don't know but the one.
Q. Do you know John Fox?
A. No, sir.
766 Q. Sprouter?
A. I don't know them.
Q. Joe Elliott, Ole Oleson?
A. I don't know Oleson.
Q. Ernest Martin, Arthur Donahue?
A. I don't know them.
Q. Did you yourself see Mitchell and Edgar and Murray, the cruisers, in Prineville, about August 14th or on August 16th?
A. I saw Mitchell up there; I don't know when it was though. It was after I went home, after the second trial.
Q. Did you see those two cruisers with him?
A. I know I did not see them.
Q. Didn't you and Graves follow them right on out to the timber the next day?
A. I did not follow anybody.
Q. No, it was when Mitchell and McAlpine were out there?
A. They were out there when I went out.
Q. You saw them in town didn't you?
A. I didn't see McAlpine.
Q. You saw Mitchell?
A. I saw Mitchell there.
Q. And you went out and took graves the next day didn't you?
A. I don't know how long they had been up there.
Q. Wasn't it the day after you saw mitchell in town?
A. I don't remember Mr. Heney, it might have been the day after or two or three days after. I tell you I don't remember when I saw Mitchell there.
Q. You say you never saw Campbell Duncan in your office until this spring?
767 A. Not that I remember of.
Q. You saw him in your office several times this spring didn't you?
A. Yes, sir, he came in to get money two or three times; we were owing him.

Q. You say the newspaper reports led you to believe there might be trouble over these filings?

A. Yes, sir.

Q. And that was one of the reasons you told Duncan to relinquish?

A. That was one of the reasons, yes, and another reason, I expected to sell some property and did not.

Q. You saw that Oregonian article, didn't you that is dated November 24th, which has been read in evidence here?

A. I might have seen it but I had forgotten all about it; I see so many articles.

Q. Isn't that the article that caused you to tell Duncan and these others to relinquish?

A. I don't know that that was the particular article. There was hardly any time but what there was some article.

Q. That article did not say you could not loan money on timber claims, did it?

A. I could not tell you what that article claimed.

Q. You never saw any article that told you that you could not loan money on timber claims did you?

A. Not that I know of, not that I recollect.

Q. You never saw any ruling of the Department that you could not?

A. No, I don't know as I ever did. All I gathered was from the newspapers.

768 Q. What is the population of Prineville, Doctor?

A. I think it is about a thousand or twelve hundred.

Q. It is about the same now as it was in 1902 isn't it?

A. No, there is more people there.

Q. About how many were there then?

A. Well, I should judge there was a couple of hundred more.

Q. A couple of hundred more than in 1902?

A. I think so I would not be sure Mr. Heney.

Q. You practiced medicine there a long time?

A. I practiced there twenty years or more.

Q. You say William Elliott when he talked with you you told him they ought to pay for the land they were using and that you had under lease?

A. That is according to my recollection.

Q. What land were you referring to doctor?

A. I was referring to a part of 35, in section 1.

Q. In 16-19?

A. In 16-19.

Q. Had not Gray offered before that to take section 1 off your hands?

A. No, sir.

Q. Or ask you to assign it to him?

A. No, sir.

Q. Quite sure of that?

A. I am quite sure of that.

Q. In the talk he had with Williamson and you just after the nomination?

A. No sir; nothing said about anything he would take off our hands.

Q. That was not the subject of his conversation?

A. No.

Q. In this talk with William Elliott, didn't you tell him in substance that the reason you were having parties file up there
769 was because Morrow & Keenan were crowding you on your range?

A. I don't remember ever telling Mr. Elliott any such thing.

Q. And in the same conversation didn't you tell him that the time was coming when every man would have to run his own range to run his stock on, and you wished to so arrange that business that you could run your stock all on your own land, as there would be contention in the future over the range?

A. I don't remember telling him that.

Q. And was not that during the time these filings were going on?

A. I don't remember telling him that.

Q. Didn't you say this in substance; "You men who have stock ought to stand in with us and help lease the road sections up in there then all of us who have stock on the range in common and keep Morrow & Keenan's sheep and all other sheep out?"

A. I don't think so.

Q. Where was it you saw timber sawed up into lumber up around Prineville, in the vicinity of 15-19?

A. In that immediate vicinity.

Q. Yes.

A. I did not say I saw any in that vicinity.

Q. Then you did not see any in that immediate vicinity?

A. I said I saw some in that country up there, fine timber; I saw some sawed on Mill Creek.

Q. Did you see some in 14-19?

A. No, I was not up to that mill. I saw some sawed on the McHigh Mountains.

Q. Can you give us the township? I don't know the mountains up there. What is the nearest township to 15-19 that — saw some sawed in?

770 A. It must be about 13, 16 or 17; 17, probably.

Q. That is considerably north?

A. Yes; that is considerably north.

Q. The timber gets better as you go north, doesn't it?

A. I think not.

Q. Doesn't it get better as you go north, and east, both?

A. I don't think so.

Q. You don't know?

A. Well, I have been through there; I never could see much difference.

Q. You have been up north?

A. Yes, sir; been all through that timber.

Q. You think it is about the same?

A. I think it is about the same.

Q. Did you give Chester Starr any orders as to where he was to graze his sheep on the Horse Heaven Range in the summer of 1902?

A. Did I?

Q. Yes?

A. No, sir.

Q. Did you tell him whether he was to recognize Morrow & Keenan's lease or not?

A. Why, I was not running the sheep, Mr. Heney. I was not directing the management of those sheep that summer, but I don't think there was ever anything said not to recognize Morrow & Keenan's lease.

Q. When did you first know about that, do you think?

A. They had leases there; they had a right on those sections.

Q. Have any talk with Morrow about it?

A. I don't remember talking to Morrow; we might have talked some but I don't remember.

Q. Minor Lewis is a brother-in-law of yours isn't he?

771 A. Yes, sir.

Q. And he is running a saloon in town? Lewis and White's saloon up here on Morrison Street?

A. Yes, sir.

Q. During the first trial how frequently did you stop into that saloon?

A. The first trial?

Q. Yes?

A. My family lived up on Thirteenth Street, and I guess I was in there every day, dropped in there and got a cigar and came out.

Q. Twice a day wasn't it?

A. I might have dropped in there twice a day.

Q. Every morning as you came down, and then again in the evening?

A. I might have dropped in every day and I might not every day.

Q. On the 11st of July, while this case was being tried the first time about half past seven o'clock, didn't you meet John Watkins in there, and then didn't you come outside with Lewis after you had been in there about ten minutes, and after you had talked with Lewis about fifteen minutes didn't he go back into the saloon and get John Watkins and come out with him at eight o'clock and leave him with you, and didn't you stand around the corner and talk with him for twenty minutes, and was not that before he testified in the case?

A. I don't remember meeting John Watkins until he testified. If I remember right I don't think I talked with him a minute after I met him. The transaction you speak of I have no recollection of, but I met him up there sometime I think after he——

772 Q. You don't think you talked with him a minute. Then you say you never did stand there and talk with him twenty minutes.

A. No, I never talked with him twenty minutes.

Q. Mr. Neuhausen was in Prineville, 1904 about May, did you know that at that time?

A. I learned he was there.

Q. Did you receive a letter from him asking you to come before him in regard to your timber claim?

A. I received one some time during the summer.

Q. Is that a copy of the letter, or have you the original?

A. I presume that is about the same kind of a letter I received from him.

Mr. HENEY: We will offer that letter in evidence.

The same was received and marked Government's Exhibit 194, and read in evidence as follows:

773 Mr. HENEY: I will also offer the letter written in reply thereto by doctor Gesner.

The same was received and marked Government's Exhibit 195, and read in evidence as follows:

Q. Who was the Mr. Smith referred to in your letter?

A. He was a gentleman that lived up there.

Q. When with reference to the letter did he give you the word?

A. My letter?

Q. Yes?

A. I think I wrote to him shortly after.

Q. Did he tell you Neuhausen wanted to see you?

A. I think so; yes.

Q. Was that a week or so before that letter was written?

A. I could not say Mr. Heney, for I don't remember.

Q. Didn't you hear that Mr. Neuhausen was up there for some time taking statements from those people who had filed on timber claims?

A. Yes sir.

Q. And you knew it was for the purpose of checking up the record and issuing patent if the claims were *bona fide?*

774 A. All I know about it is what was stated there.

Q. Hadn't you heard from Biggs or any body about what he was doing?

A. I don't think so.

Q. You don't think you had?

A. I might have heard it and might not; I could not say.

Q. Did you do anything to get the people who had filed up there and whom you had furnished the money to make final proof to go before him?

A. Did I?

Q. Yes?

A. No, sir.

Q. You didn't do anything towards that?

A. No sir.

Q. You did not go there and make any explanation to him yourself?

A. The only explanation I made is what I wrote him.

Q. After you wrote that letter did you take any further steps to see Mr. Neuhausen?
A. I think I was in town about a week after that.
Q. Had he gone?
A. Yes.
Q. Do you know how long he was in town up there?
A. No; I don't.

Adjourned to 9:30 A. M. September 20th, 1905.

775 Dr. VAN GESNER resumed the witness stand and his cross Examination continued by Mr. Heney:

Q. Doctor, did you ask any of those parties who were filing up there to give you a list of those timber claims?
A. At what time?
Q. At the time they were making those filings and making the arrangements to borrow the money.
A. I told them they could have the use of the money as long as I had the use of the range.
Q. Did you ever ask them to execute a lease?
A. I never asked them to execute me a lease in writing. It was understood with them as long as they used my money on these claims they understood I was to have the use of the range.
Q. John Watkins was not to use your money. He was using his own was he not?
A. He said he had his own money and would use it.
Q. Did you ask him to give you a lease?
A. But he might want to use his money, and wanted to know if I would let him have it?
Q. When was that? Before he filed?
A. Well I could not say after that; I don't remember.
Q. At the time you told him which claim to look at did you say anything to him about giving you a lease on it?
A. No; I never did.
Q. Then you took no precaution whatever to prevent these parties from leasing the land to some one else?
A. Not outside of what I have indicated?
Q. Between March and June, 1902, were you up on the range any?
A. March and June.
Q. Yes?
A. I think not; not that I remember of.

776 Q. When you were having that talk with that party in March, the second party you had the talk with about March, I mean after you came back from California, this party in Prineville, about the range—one party said he didn't know whether they would let you use it again, and then the other party, the second party was Gray I understand, you—then when you were having the talk with Gray, and Gray said he wanted to give up a portion of that land, did you say to him, "I don't know anything about that I don't know how it lays, or anything about it. Mr. Williamson

will be here in a few days, and you can talk the matter over with him," referring to the range?

A. I think so; yes.

Q. That was true was it?

A. That was true.

Q. Doctor, where are those lines located that you say you agreed upon in the cattle range lately, I understood you to say lately was it, or about the time you bought the Allen and La Follett place, or since then?

A. No; they ran lines on Horse Heaven—oh, you mean this spring?

Q. I think it was this spring, that is what I thought you meant, but since you bought the Allen & La Follett place.

A. That was in another section of country.

Q. That is another section of country?

A. Yes.

Q. Were the lines agreed upon in the Horse Heaven country?

A. They ran the lines and we abided by them. They never came to us to ask us anything about the lines.

Q. They put the line at Horse Heaven Creek did they?

A. I think so, on the east side.

Q. Where are the lines from the sheep shearing plant if you know of the land withdrawn from the Forest Reserve?

777 A. Oh, I think if I remember right, it was six or eight miles.

Q. North?

A. North-east; I don't recollect the lines of the reserve exactly now.

Q. It is a little above the middle of the township north of 15 that, is, township 14?

A. I could not say, Mr. Heney.

Q. Is Sarah M. Gerowe your sister?

A. Yes, sir.

Q. Did you suggest to her that she take up the west half of section 16 in township 15, south range 19 east, as school land? Did she apply for it in June, 1902?

Mr. BENNETT: That is objected to as immaterial, and having no relation to the issues in this case.

Objection sustained.

Q. Doctor, did I understand you to testify yesterday that you knew that the claim of Mrs. Williamson, or that you believed it had at least a million and a half feet of timber on it?

A. I think so; yes sir.

Q. Have you ever had any experience in estimating timber?

A. Well, not particularly; only in a general way. What I have learned from other people.

Q. When did you get that experience? Since the first trial.

A. Well, just a general idea I have in regard to it, what other people had told me in regard to timber land. I understand how to scale a log.

Q. On the first trial of this case when you were questioned in regard to the timber on your own claim didn't you make these answers to these questions: "Did you have anybody estimate the value of the timber on that land? A. Never did. Q. Were you able to estimate it yourself? A. No, sir. Q. On any of it? A. No sir I don't know anything about estimating timber."

778 A. I did not at that time.

Q. You did so testify on the first trial?

A. Yes; but I didn't know anything about it.

Q. Ao your information and experience on which you base your atatement of a million and a half is had since the first trial of this case? Is that right?

A. Well my information, you might say, it is a general information a general idea.

Q. And all secured since the first trial of the case?

A. Well, probably a good deal of it is; I have talked with people.

Q. Who is the man you talked with that gave you this information—Charles Graves wasn't it?

A. In regard to my claim Mr. Duncan said there was at least two million feet on there.

Q. Campbell Duncan?

A. Campbell Duncan.

Q. Were you up there at the claim at the time you were having the talk?

A. I don't know whether I was or not; I don't think so.

Q. You didn't take him up there?

A. No.

Q. This was in your office?

A. I don't know where it was.

Q. Nor when it was?

A. No sir.

Q. Wasn't it Charles Graves who told you it was a million and a half?

A. Charles Graves too.

Q. You and Charley Graves followed the photographer up there and that is the time he told you about a million and a half?

779 A We never followed any photographer.

Q. Well, you went up there the next day after the photographer went up?

A. We were up there.

Q. At the time you were making your final proof, doctor, were you not asked these questions and didn't you make these answers: "Q. How many thousand feet board measure of lumber did you estimate that there is on this entire tract, and what is the stumpage value of the same? A. About two million feet at 50 cents per M."

A. I think so.

Q. You did make that answer, and yet you testified at the first trial that you had nobody help you to estimate and that at that time you did not know anything about estimating it?

A. Well it was just a guess of mine; I don't know but it was a guess.

Q. Wasn't that question asked you and didn't you make this answer: "Q. Are you a practical lumberman or woods-man; if not, how did you arrive at your estimate of the number of feet on the land? A. No. By making personal examinations and calculations."

Q. Was that your answer?

A. I don't know.

Q. Examine it?

A. (After examining.) I suppose I did. I don't remember those questions.

Q. You find it written down there don't you?

A. It is written down.

Q. This was taken before Biggs?

A. I think so.

780 Q. You were a witness for the Sarah V. Williamson claim, were you not on final proof?

A. I was, yes.

Q. Is that your testimony, those two papers?

A. That is my signature, yes sir.

Q. And in regard to the Sarah V. Williamson claim was not this question asked you and did you not make this answer: "Q. Explain the circumstances under which you made a personal examination of this land, and describe the tract fully? A. I have never given especial attention to the land. I am a physician and have driven along the roads that runs through each 40 and in that way became acquainted with it. Had no reason to notice this tract more than any other. I might drive through. It is hilly, mountainous and rocky, sandy or decomposed lava; stream passes through; quite heavily timbered with pine. There is some grass but no undergrowth of brush. It is hardly suitable for grazing."

Did you make that answer to that question?

A. I don't remember Mr. Heney; I probably did.

Q. It is written down there isn't it?

A. Yes.

Q. To these questions did you make these answers: "Q. What is her financial condition so far as you know? A. I don't know. I have been told she had some money. Q. Do you know of your own knowledge that the applicant has sufficient money of her own to pay for this land and hold it six months without mortgaging it? A. Not of my own knowledge, but I think she has. I heard she got some money from her uncle. I don't know how much."

Do you remember those questions and answers?

A. Yes sir.

Q. In answer to this question did you make this answer: "Q. Is the land more valuable for mineral or for any other purpose than for the timber and stone thereon, or is it chiefly valuable for

781 timber or stone? A. Valuable for timber."

A. Well, that would be my opinion, that is the most value to it, the timber.

Q. *Only* for timber?

A. Well, it might have been. That "only"——

Q. Well that is the answer you made at that time?

A. I could not say.
Q. That is written down there isn't it?
A. I think so, yes sir.
Q. You were a witness for Mr. Williamson, were you not?
A. I was.
Q. On December 10, 1902. Now, didn't you testify in regard to the Williamson timber claim: "Q. Is it fit for cultivation? A. No. Q. What causes render it unfit for cultivation? A. Stony and hilly and light poor soil and densely covered with valuable pine timber."
A. Well, that is a fact.
Q. That is the way you answered it is it?
A. I think so.
Q. Now, did you answer these questions: "Q. Now, is the land more valuable for mineral or any other purpose than for the timber or stone thereon, or is it chiefly valuable for timber and stone? A. No. Yes, for timber."
That is correct?
A. Yes.
Q. Then the next questions, "Q. From what facts do you claim that the land is chiefly valuable for timber or stone? A. Because the timber is dense and valuable for lumber."
Was that your answer?
A. It is.
Q. Then the next question, "Q. Are you in any way interested in this application, or in the lands above described, or the timber or stone salines or mines or other improvements of any de-
782 scription thereon? A. No."
A. Yes sir.

Redirect examination:

Q. Doctor, you heard the testimony of Detective Mitchell or Mr. Mitchell?
A. I did.
Q. In which he undertook to repeat something he claimed to have listened and overheard between you and Mr. Cooper? What was that conversation as you remember it?
A. Well, Now as I remember that conversation, Mr. Cooper was sitting there in the Imperial Hotel, and this little fellow Mitchell was sitting right beside him. I came in there and he spoke to me and says "How are you Doc. How are you getting along?" "Oh (I told him) slowly dragging along." Well, he says, "they don't appear to want to let these fellows tell all they know." I says, "No, Heney won't let them; he has got a club,—hold- a club over them," or something to that effect.
Q. At that time did you know Mitchell's occupation?
A. I did.
Q. What did you understand it to be?
A. I supposed he was a spotter or detective; I don't know what you would call him.
Q. You may state whether you saw him before the talk?
A. I did.

Q. Some anonymous letters or letters signed "citizen" perhaps were introduced in evidence when Mr. Wood was on the witness stand; one of them addressed to LaFollette and Allen. Will you tell the jury how those letters came into your possession?

A. One of them Mr. LaFollette gave to me and the other was mailed to us through the Post Office. I was coming down here—when we got our letter I spoke to Mr. LaFollette and I told him I was coming down to lay the matter before the Governor.

783 But before that I think we had made application with the agent of the road company there, and he told me, "If you go to Portland, go and lay the matter before Mr. Wood;" he had wrote to him as fully as he could. So when I came down here the Governor was away and I had to wait here three or four days to get an audience with him, 'phoned to him at Salem; and when he came down I showed him this letter. In the meantime I talked to Mr. Wood about it and explained the situation in that country to him.

Q. Who did you say gave you this LaFollette letter?

A. Mr. LaFollette himself.

Q. Immediately before your coming down?

A. Yes.

Q. Was that before or after you had leased the LaFollette and Allen ranches as grazing land?

A. It was afterwards.

Q. How did you receive the other letter?

A. I received it through the mail. It was mailed at Prineville and the Post-Master knew the character of the letter for there had been a good many of them went through the office, and when he got it he stamped it and brought it into the office there, and we wasn't in there and he laid it on the table.

Q. How was the character of the letter evident? From the envelope.

A. Well I suppose the printed names there on the envelope.

Q. You have testified something there concerning the situation of the LaFollette ranches in connection with your land and ranges.

A. Well, what I testified was in regard to the farming ranches, the shearing plant and that farm.

Q. How near are some of the grazing lands you leased from LaFollette and Allen to your premises in the Horse Heaven

784 country?

A. Some of it is adjacent to our grazing land; some of their grazing land, and if I mistake not they have some deeded land that is connected with their leased land, that connects with our leased land.

Q. Referring to these photographs that are in evidence, Doctor, I want to ask you whether they look natural or not?

A. Never would recognize one of them at all if I didn't know.

Q. What were your relations with Morrow and Keenan as to being friendly or otherwise?

A. Our relations have always been very friendly.

Q. You may state whether you were afraid of Morrow and Keenan shooting or causing any of your sheep to be shot or injured?

A. I was not, no sir.

Q. Referring to the claim of Jefferson Evans, I will ask you whether that has any additional value as grazing lands to you on account of its laying between some leased sections?

A. No sir.

Q. Those sections that lie adjacent or abutting to the Evans claim, did you own?

A. No, we did not own them.

Q. What was your interest in them, if anything.

A. Simply a lease.

Q. Do you know when that lease would expire in 1902?

A. No, I didn't, but I think in a short time; I don't know I don't remember.

Q. Doctor, I will ask you whether you ever saw or heard from Branton, the witness, in any way after the time you were up at the timber with Duncan, until after or during the second trial of this case?

A. I don't remember ever meeting him since then.

785 Q. Or hearing from him?

A. Or hearing from him.

Q. Did you know where he was?

A. No, I didn't.

Q. Up to the time of receiving the telephone message from M. R. Elliott that has been spoken of, did you know where he lived?

A. No I didn't.

Q. You may state to the jury whether you drew any checks, signing them in your own name, on the account you had with French & Company at The Dalles?

A. Yes I did.

Q. I will ask you whether you knew or not that some of those checks, they being for money loaned to these claimants, were sent direct to the Dalles Land Office?

A. I don't understand what you mean Mr. Wilson?

Q. Did you know the custom of the Land Office as to receiving checks that were drawn on The Dalles Bank?

A. Why I think that was my understanding of it, that they would receive checks.

Q. Drawn on The Dalles Bank?

A. Yes.

Q. Now I will ask you if you understood that the checks you drew on The Dalles Bank for money loaned to these several claimants were sent to the Dalles Land Office?

A. Yes sir.

Q. Do you remember about how many claims were filed in that locality or vicinity during 1902; in the Horse Heaven country I mean?

A. In that vicinity I think there must have been some 20 claims, some of them north of there, all around in that vicinity?

Q. Referring again to Morrow and Keenan, I will ask you whether

or not your friendly relations were disturbed in any way by the fact that they filed on some land within your range?

786 A. None whatever, no sir.

Q. My attention is called to the fact that I said land filed on by Morrow & Keenan? You understood leased?

A. I understood leased.

Q. You may tell the jury whether or not you testified at the first trial concerning the incident of your talk with two men—Mr. Graves and Mr. Lister?

A. I testified to that incident, but I never mentioned their names.

Q. Why didn't you mention any names?

A. Why I didn't care to drag in any outsider into the case.

Q. Was the question asked you direct?

A. No, the question was not asked me either.

Q. Doctor, I want to make it clear to this jury what the firm name was of the firm in which you were interested in 1902, and what the firm name was immediately prior to that and after Wakefield sold out?

A. Prior to that it was Williamson and Wakefield and in 1902, it was Williamson, Wakefield and Gesner, and after Mr. Wakefield sold out, it was Williamson and Gesner.

Q. And you bought in in the spring of 1902 or in the fall of 1901.

A. The fall of 1901.

Q. How long had Williamson and Wakefield been in the business together under the name of Williamson and Wakefield before you bought in?

A. I think they had been in two or three years; I would not be sure just the length of time. It might have been longer.

Q. And after Wakefield went out you did business under the firm name of Williamson & Gesner?

787 A. Yes sir.

Q. I will ask you if you had any talk with Ernest Starr, concerning the purchase of an interest in the firm.

A. I did; I talked with Ernest Starr a number of times in regard to it, and talked to his brother about buying an interest in the firm. Talked to him in regard to buying Wakefield out and talked to him about buying a fourth interest in it, him and his brother.

Q. When were these talks or any of them in relation to the time when Ernest Starr filed on the claim up there?

A. It was before, most of them. I might have talked to him afterwards too.

Q. What, if anything, was said between you and Starr at the time you had the talk with him concerning buying, about his buying in?

A. Right at the time he filed.

Q. Or at the time he talked with you about filing?

A. He came to me and said he had some money in the bank that was doing him no good and wanted to know if we did not want to use it; he wasn't making anything out of it. I told him no, we didn't particularly want to use it. I says, "Everybody is filing on

timber claims, probably you can make something by filing on a timber claim, and if you buy in there it will be of some use to you, and if you don't buy in probably I will buy it of you." I think that was about the general conversation we had.

Q. I wish you would tell the jury whether or not you insisted on any person taking any particular claim?

A. I never did no.

Q. What was the general rule when husband and wife filed, as to the relative locations of the claims upon which they filed?

Mr. HENRY: I object to that because there is no general
788 rule. The locations are all in evidence and show for themselves. (After some argument the objection was withdrawn.)

Q. What is the fact, Doctor, as to whether a husband and wife where you were to loan money to them to prove up on, located together, or in separate places usually?

A. I should think some of them located together and some separately.

Q. Do you remember anybody besides Biggs, where the husband and wife located in different sections or adjoining claims?

A. I think probably Mr. Graves and his wife is about the only ones I can recall.

Q. You may state to the jury whether or not you authorized Biggs to act for you in any manner concerning the loaning of money to timber claimants?

A. I never did, no sir.

Q. How did it happen in that connection that the Biggs claim was located not in connection with his wife's claim, if you know?

A. Why if I remember, he told me that he knew all that country up around the shearing plant there, knew there was good timber in there, and if I could point him out a quarter section there that was good timber he would file on it. That is the way he came to file in there.

Q. Was that before or after his wife had filed?

A. I think it was after his wife had filed. I would not be sure.

Q. I will ask you whether or not Mr. Biggs had any interest in these claims other than himself.

A. No sir.

Q. What is the fact as to whether you charged any of these people anything for locating them or pointing out any timber land?

A. I never charged them nothing.

789 Q. Do you remember when it was you first heard questions were being raised as to the right of a person to loan money to timber claimants, or a number of people in the same family to borrow money?

A. No, I don't remember exactly, Mr. Wilson, but it was some time that summer or fall I think; in the papers; but it is so long ago I have forgot.

Q. Why were you particular, if you were particular, in stating to these claimants just exactly what you could do and what you could not do with reference to a timber claim?

A. Well I had taken legal advice on the matter and I wanted to be within the law in regard to it.

Q. Did you have in your mind, at that time, fresh what you had been advised?

A. Yes sir.

Q. What do you say Doctor, as to the possibility of your writing two checks on the same day and dating one of them December 11, and the other December 9?

A. I don't think I would be likely to do it. I don't remember ever making a mistake like that before?

Q. What do you say as to those checks bearing the true date?

A. My judgment is they bear the true date. That is to the best of my knowledge.

Q. Do you know John Brown, the man that is one of these claimants?

A. I do.

Q. How long have you known him and who was he?

A. I think I have known him ever since I was in that country, twenty-five or twenty-six years ago.

Q. Is he an old timer there?

A. An old timer.

790 Q. Came there in the first settlement of the country?

A. Yes.

Q. How about Monroe Hodges; did you know him?

A. Yes.

Q. Who was he?

A. He was among the first settlers there.

Q. Was he poor at that time?

A. Oh, moderate circumstances.

Q. Explain to the jury what kind of grass grows in that country in the timber?

A. Why it is a little bunch grass, small grass; and what they call a pine grass that grows up six or eight inches high. That pine grass is a kind of sour grass, and different variety of weeds. The pine grass is not very good feed, but stock will eat it.

Q. Stock will or will not eat it?

A. They will; that is, they will not eat that until the other is gone. Sheep eat it better than cattle.

Q. Did you say it was sour?

A. A little inclined to be sour.

Q. What do you say as to whether or not the timber in that country is better or poorer where the water is?

A. Well, I think it is better along these water courses.

Q. Where is the water mostly?

A. In these canyons and ravines.

Q. What is this land most valuable for upon which these timber claims are filed, timber or grazing?

A. I should say timber.

Q. How did you expect to get the money when you first commenced making or agreeing to make these loans?

A. Why I had some property at Salem, a farm, interested in a farm there and I expected to sell that.

791 Q. Had you made any arrangements with them for the sale of it?

A. Yes sir, there was a negotiation on for the sale of it.

Q. You may state whether that sale was consummated or not?

A. No, it never was.

Q. That was the cause of your having to borrow money?

A. One, cause yes.

Q. When was it the loan was made with French and Company, about?

A. I think it was in December, as near as I remember; that is when we got the note.

Q. And the first filings were made in the preceding June?

A. Yes sir.

Q. Doctor, when did you first talk with Williamson about loaning the money on these claims, or loaning money on timber claims generally?

A. In July.

Q. That is the time you first remember of it?

A. That is the first time I remember of it Mr. Wilson.

Q. What do you say about the probabilities of your talking with him about that when he was there in June?

A. He was there in June, but I don't remember of it. We probably talked that business over, talked some about it.

Q. But you had forgotten his being there in June?

A. I had forgotten his being there in June.

Q. There has been some testimony about a band of sheep of yours that was shot into in 1902. What did you do with that band of sheep immediately thereafter?

A. They were removed right away, the next day, I think?

Q. Where?

A. Right close to our pasture.

Q. Where did that shooting occur?

A. It was on the west and——

(Cross:)

Q. Are you talking of your own knowledge Doctor?

A. No, I wasn't there.

792 Mr. HENEY: It is easy enough to get the parties who were there, I guess.

Mr. BENNETT: I don't think it is. We don't know where they are. The man who had charge of the sheep was Montgomery, and he is out of the country; we have no idea where he is.

Q. Where was that Doctor?

A. It was on the west and north side of Horse Heaven.

Mr. HENEY: You won't object to having Mr. Keenan state what his herder told him then, will you, if I let him testify to hearsay?

Mr. BENNETT: Well I submit that this is competent whether Mr. Heney sees fit to let us put it in or not. Information upon which

they acted is competent, whether true or false. Mr. Heney asked him on cross examination as to where the sheep were killed.

Mr. HENEY: Well, if you are talking about his sheep go ahead.

Q. On which side of Horse Heaven was it?
A. On the west and north.
Q. Look at that map and show where it was.
A. Well I can only give you a general idea of it, Mr. Wilson?
Q. Here is township 15 range 20. What range was it in?
A. 15-20.
Q. That is 15-20?
A. Yes.
Q. Now, here is Horse Heaven marked out here?
A. Yes sir; I don't know whether it is correct or not.
Q. Which side of Horse Heaven do you say that killing occurred? East or West?
A. Well, it would be on the west side.
Q. The top of this map is north?
A. Yes sir. I don't think Horse Heaven is mapped out—the creek isn't mapped out there.

793 Q. Here is the creek. It was over in range 20 was it?
A. In range 20.

Q. Which way do you call east and which west on this map?
A. I call that west (referring to the left hand side of the map).
Q. And this is east?
A. Yes.
Q. Now, calling that east and this west, and this Horse Heaven Creek which side of the creek were these sheep killed on?
A. They were killed on the west side, in here somewhere.
Q. Where is Horse Heaven Creek with reference to the place they were killed?
A. You mean the location?
Q. Yes, where is Horse Heaven Creek with reference to the place where you understood these sheep were killed?
A. I understood Horse Heaven Creek was on the south and east of it.

(Mr. HENEY:)

Q. Point it out on that map.
A. I can't tell you exactly.

(Mr. HENEY:)

Q. Well, about what direction does Horse Heaven Creek run in there? Here it is where it is marked on the map.
A. I think Horse Heaven runs up this way, up through here; that is my idea about it.

(Mr. WILSON resuming:)

Q. If this is correct, on which side of Horse Heaven would the sheep be killed?
A. Killed on the west and north.
Q. If this map is correct?

Mr. BENNETT: It is his idea that Horse Heaven makes a turn in there.

Mr. HENEY: I think it starts up in that township, doesn't it Doctor? Starts over in here somewhere doesn't it?

794 A. I don't know.

Q. Anyhow, they were killed over there in Range 20?

A. Yes.

Q. Now state what the fact is as to whether these sheep had been ranging up there in that country prior to this time of the killing?

A. They had been ranging there for a long time, for years.

Q. What did you do with them immediately after the killing?

A. Brought them down to our—I think they were brought down to the Cable ranch, right close there.

Q. What is the fact as to whether you ever returned the sheep into that section of country for grazing?

A. Not to my knowledge.

Q. Then you were driven out of the old range by this killing?

A. Yes.

Q. Doctor, something has been asked you concerning the claims of Pearl Vanderpool, Fox, Cady and Sam Smith, I think. I will ask you whether or not you had anything to do with them?

A. I did not; don't know anything about them.

Q. Do you know anything about any attempt to get site for a saw mill in the country where these timber claims were filed?

A. Yes sir.

Q. What do you know about it?

A. Mr. Hawkins was talking to me this spring and wanted to get some timber up there to start a saw mill. He had a saw mill over on Ochoco a great deal farther from town and had used all his timber there, and he wanted to get closer to town and he had moved over on another section on the Grizzly north of Prineville but he wanted to put a mill up in this country and wanted to get hold of some timber land up there, and spoke about Veazie Creek.

795 Mr. HENEY: Who was that?

A. Hawkins Brothers, two saw mill men.

Q. Do you know anything about the Government selling timber from its reserves in that locality?

A. No I don't.

Q. Do you know anything about the price they charge for stumpage?

A. My understanding is they charge a dollar a thousand.

Q. Stumpage?

A. Yes sir.

Mr. HENEY: The Government Forest Reserve you mean?

A. Well, Government timber; I don't know whether it is reserve or what?

Q. What about the timber you have seen sawed in that country in comparison with the timber that is on these claims?

A. I don't think it is any better than the timber on these claims.

Q. What was it you testified to concerning some men working in that section locating? Who were they?

A. A fellow by the name of Foster was working in that section.
Q. When?
A. In 1902.
Q. Is he — only man that worked in there that you know of, locating lands?
A. No, a man by the name of Higgins was working in there right north in that township.
Q. And Foster?
A. Foster was working in this township.
Q. 15-19?
A. In 15-19.
Q. Do you remember seeing Mr. John S. Watkins, a man who has testified here? Perhaps you testified in your direct examination or cross-examination about seeing him.
796 A. Seeing him here in town?
Q. Yes.
A. Why yes, I met him frequently, that is, I saw him occasionally.
Q. What?
A. Yes, I saw him.
Q. At the time you think Mitchell testified about?
A. I don't know in regard to the time. I think it was after the first trial.
Q. You think it was after the first trial?
A. I think so, either after the first trial or after the second; I would not be sure.
Q. It is the same conversation if you had one, that they referred to in their cross examination?
A. Yes, the same conversation.
Q. Now, you may tell the jury what you said to Watkins, if anything?
A. Watkins and I was standing out there on the side walk, and he came up there, him and three or four of them, Snelling was standing a little ways off, one of the detectives; and Watkins commenced talking to me about the case, and I didn't want to talk to him about it. I told him "All I ask of you people is to tell the truth about it. That is all I ask of you."
Q. Did you have any talk with him further than that?
A. Not that I remember of, Mr. Wilson.
Q. Who is Snelling that you refer to?
A. Well he is a man that my understanding is has been around here watching; a detective or inspector; I don't know what you would call him.
797 Q. Did you seek the conversation with Watkins at that time, try to get into conversation with him?
A. No sir.
Q. You may state whether or not Watkins was drunk at that time?
A. He was a little full at that time.
Q. You have testified something about agreeing to loan money to

Charlie Graves. I wish you would explain that a little more fully to the jury?

A. Charlie Graves when he first took up that claim wanted to know if I would go on his note at the bank, and I had partially promised to go on his note at the bank for the money.

Q. But you finally loaned him the money?

A. Finally loaned him the money.

Q. You have testified I believe that Parkey said that Burns had given him until the next day to change his story. Was the Grand Jury in session at that time?

A. I think so, Mr. Wilson.

Q. Don't you know whether it was or not?

A. I am satisfied it was, yes.

798 The foregoing is all of the direct, cross and redirect testimony of the aforesaid witness Van Gesner, and all of the testimony of said witness Gesner prior to his re-cross examination.

799 And thereafter upon re-cross examination said witness having been asked by the attorney for the government, as to the proposed lines of the forest reserve north of township 15-19, was asked the following question, "You own some school sections bordering on it, don't you all the way round? Objected to as immaterial and irrelevant. A. I own part of a school section in township 14. Q. Don't you own in every school section that borders on the Forest Reserve? Don't you own some school land on every section that borders on the Forest Reserve on the south side there? To which question the defendants and each of them objected as immaterial and not proper cross-examination, having nothing to do with the question involved in the case, to which the objection was overruled and defendants except. The witness answered, "No, sir. Q. You do not? Same objection, ruling and exception. A. No, sir. I own in one school section. Q. You only own in one? A. I only own in one school section. Q. By your owning, I mean, don't you own an interest with others in each school section, that is in each township bordering on the reserve along here? Objected to as immaterial and incompetent and not proper cross examination and having nothing to do with the questions involved in this case. Objection was over-ruled to which ruling defendants each excepted and their exception was allowed. A. My understanding—I will explain. In township 14-19, we own part of a school section there, school section 36, I think that adjoins on the Reserve, and that is the only place I know where the line of the Reserve is.

800 The following is the entire recross examination of the aforesaid witness V. Gesner and also all of his redirect examination following his recross examination and it together with the testimony of said witness Van Gesner hereinbefore written is all the testimony of said witness introduced at the trial prior to the time the defendants and each of them rested his case and at the close of the following the witness was excused.

801 SEPTEMBER 20, 1905.

Recross-examination:

Q. Now, at the second trial of this case, didn't you testify that you didn't remember having that conversation with Watkins?

A. I don't think so, no.

Q. You don't think so?

A. No.

Q. You were asked about the conversation, weren't you?

A. I think I said that I didn't remember about the date and time, but I had talked to Watkins.

Q. Well, you say now that you don't know whether it was during the second trial or not, or after the second trial; as a matter of fact you were questioned during the second trial as to whether you hadn't had the conversation, were you not?

A. I think it was the first trial. I don't remember whether it was the second or not. I might have been.

Q. And on the second trial, weren't you asked these questions: "Weren't you in Lewis and White's saloon on July 9th, a little before 4 o'clock in the afternoon, for five minutes while Henry Beard and John Watkins were in there?"

A. Well, I might have been in there; I couldn't say.

Q. Did you talk with either of them?

A. If I did, it was just a casual conversation.

Q. Now, on July 11th, didn't you meet John Watkins in Lewis and White's saloon, and, in order to refresh your memory, didn't you go in at 7:20, and, after staying ten minutes didn't — call Lewis outside and talk with him about fifteen minutes and then go back into the saloon and get John Watkins, and come out with him at eight o'clock, and talk with him outside for twenty minutes?

A. I think not, Mr. Heney, I think not, sir.

802 Q. Didn't you then go back into the saloon and have another short talk with Lewis and then take him outside of the saloon and talk with him, and then didn't Watkins come out and join the two of you there for about five minutes.

A. I don't remember any such transaction taking place at all.

Q. That is on July, 11th."

Do you remember those questions and answers?

A. Yes they were asked me.

Q. Now, then on re-direct examination by Mr. Wilson on the second trial weren't you asked these questions and made these answers:

"Dr. have you kept a memorandum of every friend that you have nodded to and every man that you have spoken to, so as to dispute any spotters and spies who might be dodging you during the trial?

A. I have not.

Q. Now as these people to whom counsel has referred, and as to your speaking to them, are they all acquaintances of yours?

A. All friends of mine, yes sir.

Q. Do you remember that?

A. I remember something of that kind, yes.

Q. And isn't that all that you testified to on the subject of your conversation with Watkins, then, during the second trial?

A. I couldn't say, Mr. Heney. Those things slip my mind.

Q. Now, when you had this talk with J. L. Cooper, down in the Imperial Hotel, right after this conversation that you have stated didn't Cooper say to you—"Well, Doc. I hope things will go all right for you; it will make it better for all concerned." And to that didn't you say—"I think it will; we will try hard at least?"

A. I don't think so.

Q. Or that in substance?

803 A. I don't think so; no sir.

Q. And didn't Cooper tell you that he expected the Government to get after him and indict him for the same kind of a transaction that you were being tried for?

A. No sir.

Q. And didn't you whisper to Cooper, immediately after you noticed Mitchell there, and then Cooper got up and walked off with you?

A. I noticed Cooper there when I first spoke to Cooper.

Q. Didn't you whisper to Cooper after this conversation that you tell about, and then Cooper got up and went off with you?

A. I don't think so.

Q. Did Cooper tell you that night, after you had been asked these questions on the witness stand—when you were first asked the questions—it was on the first trial,—and I thought that the name of the man that had talked with you was Booth. Do you recall that?

A. How is that?

Q. At the first trial you were asked these questions and made these answers, were you not:"

"Do you know J. O. Booth?

A. I don't think I so.

Q. You know R. A. Booth, don't you?

A. Yes.

Q. Don't you know his brother, J. O. Booth?

A. No, I do not think I know his brother.

Q. Who keeps a hotel at Grants Pass?

A. I don't know him.

Q. You don't know him?

A. No, sir.

Q. Didn't you say to him in the Imperial Hotel, and weren't you talking with him in the Imperial Hotel, on July 10th, after

804 this trial commenced at 9:30 in the morning, and didn't this conversation take place between you: Booth said—"Doc, how are things going: Them fellers don't seem to want to tell everything, do they?" And to that, didn't you say, "No, they are doing very well; they dare not tell everything as they know which side of the bread their butter is on."

A. I never said no such thing. I don't know Booth at all.

Q. Nor that in substance?

A. No sir. I never said anything like that.

Q. Then didn't Booth say to you, "Well Doc, I hope things will

go all right for you; it will make it better for all concerned." And to that didn't you say, "I think it will; we will try hard at least?"

A. No, I never had any conversation with Booth whatever. I don't know the man.

Q. Did you have any conversation with any other person?

A. No, sir. I never had any conversation with any other person.

Q. At 9:30 A. M. in the office of the Imperial Hotel, July 10, 1905, in which that was said that I have just read to you?

A. No sir.

Q. And in which you stated in substance what I have just read to you?

A. No sir. I never had no such conversation with any body, in any hotel, or in any place.

Q. Do you remember being there in the Imperial Hotel office?

A. I have been in the hotel.

Q. On the morning of July 10 of this year at 9:30?

A. I have been there off and on ever since the trial commenced but I dont' know whether I was in there that morning or not."

Do you remember those questions and answers?

805 A. Yes.

Q. Well, now, in the first place, doesn't J. L. Cooper look something like—Oh, you don't know this man Booth by sight at all so you can't answer.

A. I never saw him in my life.

Q. You didn't state this conversation that you have related upon the first trial, did you?

A. No, I did not.

Q. After you were asked this question on the stand, when you came back the next morning, do you remember of being called back the next day, and the name of J. L. Cooper being given you and the same questions being asked you?

A. I think I do.

Q. Did you state the conversation at that time?

A. No, I did not.

Q. Now, how soon after that did you see Cooper?

A. Why, I don't know, Mr. Heney, whether I saw him for some time or not; I might have saw him shortly.

Q. Wasn't he down here two or three days afterwards?

A. I think he was, but I don't remember whether I talked with him or not.

Q. Did you communicate with him or your attorneys communicate with him that night, by phone, or the next night or day?

A. I don't know whether they did or not; they might have 'phoned him or not. I couldn't say.

Q. Didn't they tell you they did, and that he said that he could not testify to that conversation, because he admitted it to Burns over the 'phone?

A. No, nothing of the kind.

Q. Didn't he tell you that Burns called him up over the 'phone

an- questioned him about that conversation, on that same night that you were examined?

806 A. Now, I will tell you. If I recollect right, he said that this man Snelling called him up and represented himself as Wilson attorney Wilson, speaking to him. Whom he told that to, or how I got hold of that, I couldn't say that now, but I think he said, I wouldn't be sure who it was, but that is, I remember hearing that, that Snelling called him up and represented himself as Wilson.

Q. And did he say, thinking it was Wilson that he admitted the conversation and so couldn't testify for you?

A. No.

Q. Didn't you tell that?

A. No, sir.

Q. Didn't he tell you, as a matter of fact, that Snelling came up to Salem and saw him on the following day, after you were on the witness stand and that he then and there admitted it to Snelling?

A. No sir.

Q. He didn't tell you that?

A. He said Snelling followed him up, but he never said he had admitted anything.

Q. He said he saw Snelling at Salem?

A. At Independence, I think Snelling followed him.

Q. And he had a talk there.

A. I don't know that he had any talk there.

Q. Didn't he tell you he had a talk with Snelling?

A. I presume he did, I don't remember.

Q. No, didn't he tell you he did, and isn't that why you hav-n't called him as a witness in this case?

A. He might have said he had a talk with Snelling. I don't remember.

Q. Isn't that why you hav-n't called him as a witness in the case, to contradict Mitchell?

A. Why we hav-n't.

807 Q. Yes, you hav-n't called him have you?

A. No, I hav-n't called him.

Q. I mean you haven't tried to get him here?

A. He was talking with the attorneys. I don't know anything about it; they are managing the case.

Q. Who telephoned Branton to come down here, or sent him word when to come?

A. I was talking to Mr. Branton in Prineville.

Q. Well, did you tell him just when to come here?

A. No, he told me he had to go to Eugene or over in the Valley there somewhere and I asked him if he would come down on a telephone message or would I have to subpœna him. I told him I would pay him the same wages that he got as a witness; he said he would come on a telephone message.

Q. Now, who telephoned him, and when?

A. Why, I think I telephoned him.

Q. You telephoned him.

A. I think so, yes.

Q. Now, where did you tell him to go when he got here?
A. Where did I tell him?
Q. When he arrived, yes?
A. I told him to get a room?
Q. You told him to get a room?
A. Yes, sir.
Q. Didn't you tell him you had secured one for him?
A. No, I never secured any room for him.
Q. Who did secure the room for him, do you know?
A. He secured it himself so far as I know.
Q. Did you tell him to let you know where he was?
A. Yes, sir, I did.
Q. As soon as he got here?
A. He come up to our room.

Q. Came up to your room as soon as he got here?
808 A. Yes, sir, or shortly afterwards.

Q. You told him to keep away from here, didn't you? From the court house?
A. To keep away from the court house?
Q. Yes, and keep out of sight?
A. I told him not to talk with the witnesses or anything.
Q. To keep out of sight?
A. I don't know as I told him to keep out of sight; I said "You can go around the fair we don't need you for several days; it isn't necessary for you to be here."
Q. Doctor, did you use any of that timber up there in 15-19? Do you know of any timber ever being cut in that township for lumber?
A. There is timber cut right north of there.
Q. Right north of there?
A. Yes.
Q. That is in the township north of that?
A. Township north of that.
Q. As a matter of fact, it is above the middle of the township north of it that the timber was cut, wasn't it?
A. Above the middle.
Q. Where is that?
A. I couldn't say exactly the location; it is right in north there close to that township.
Q. You don't know where the lines of the forest reserve are there, as recommended by the Geological Survey?
A. No, I don't know; I don't remember.
Q. You own some school sections bordering on it, don't you, all the way around?

Objected to as immaterial and irrelevant.
Objection overruled. Defendants except.

A. I own part of a school section in township 14.
809 Q. Don't you own in every school section that borders on the forest reserve? Don't you own some school land on every section that borders on the forest reserve on the south side, there?

Objected to as immaterial; not proper cross-examination, having nothing to do with the question involved in the case.

Objection overruled.

Defendants except.

A. No sir.

Q. You do not?

A. No sir. I own in one school section.

Q. You only own in one?

A. I only own in one school section.

Q. By your owning I mean, don't you own an interest with others in each school section, that is in each township bordering on that reserve along here?

Objected to.

Mr. HENEY: He says he doesn't know where the lines of that reserve is. I am testing the accuracy of that.

A. My understanding—I will explain. In township 14-19, we own part of a school section there, school section 36; I think that adjoins on the reserve and that is the only place I know where the line of the reserve is.

Q. You don't mean section 36 in 14-19; you mean 16, don't you?

A. Section 36.

Q. 36 is way down at the bottom just next to 15-19; there is another withdrawal made down there, is there?

A. There is where we own in that section.

Q. What? In 36?

A. In 36.

Q. Doctor you have said that the only ones that husband and wife filed where you could think of, besides Biggs and his
810 wife, were Graves and his wife where they were separate.

A. Well, there might have been several; I don't know Mr. Heney. I don't remember. The filings and the map will show that.

Q. Yes, I am going to show you that, show you that general rule. There is the Mahala J. Evans claim which was filed on the same day as her husband's, there is the husband's claim, Jeff Evans' claim, isn't that correct?

A. I presume so, I don't know.

Q. Now then, we will take Foster. There is the Robert B. Foster claim. There is the husband's and there is Laura Foster's and Ada Foster's. Now then we will take Kotzman and his wife. There is Adolph Kotzman and there is his wife filed the same day. Now we will take Ora Parker. There is Ora L. Parker and there is his wife. (Pointing out claims on the map.)

Redirect examination:

Q. What do you say, now, doctor, as to whether you had any such extended conversation with Mr. Watkins as the questions of Mr. Heney indicate?

A. I have never had any such extended conversation.

Q. And what do you say as to whether you had any such conver-

sations in substance with Mr. Cooper as the questions of Mr. Heney indicate?

A. I never had any such conversation. The conversation I had with Mr. Cooper is what I related this morning, as near as I remember.

Q. Now, I will ask you whether or not Mr. Cooper indicated to you why he didn't want to be a witness?

A. I didn't talk with him in regard to it.

Q. Well, did you hear why he didn't want to be a witness?

A. No, I don't think I did. Not that I remember of.

Q. Let me refresh your memory. Didn't you hear that he was afraid of the Government if he went on the stand?

811 A. Well I think there was something said in regard to that.

Q. Afraid he would get into trouble with the Government of his own if he went onto the stand and testified?

A. I think there was something said in regard to it.

Q. Now, did Mr. Cooper ever tell you or indicate to you in any way that he remembered the conversation the way the Government remembers it?

A. No, sir. He never did.

Q. I will ask you whether or not you ever understood Cooper to say or heard that Cooper said, that he had told them that the conversation was as the prosecution claims?

A. I never did. No.

And thereupon witness was excused.

812 SEPTEMBER 20, 1905.

J. N. WILLIAMSON, one of the defendants, sworn on behalf of the defendants, testified as follows:

Direct examination.

By Mr. BENNETT:

Q. Mr. Williamson, you are one of the defendants in this case?

A. Yes sir.

Q. Where do you reside Mr. Williamson?

A. At Prineville I have resided since 1876 until about five years ago I moved my family to The Dalles for two purposes. My wife is trying to educate her daughters in the Sister's School, and we moved down there as that is the nearest school of that kind and since that time you might say my residence has been The Dalles.

Q. Whereabouts were you born Mr. Williamson?

A. In Lane County Oregon.

Q. When?

A. November 8, 1855.

Q. When did you first go to the Crook County country?

A. September 1876.

Q. You were then how old?

A. Twenty years old.

Q. And have you resided there ever since that time? Until you went temporarily to The Dalles to school your children?

A. I have.

Q. What business have you been engaged in since you went to Crook County?

A. I have been engaged in farming and stock raising. When I first went there I begun in that country herding sheep until I got a little start and engaged in raising stock, principally sheep.

813 Q. In 1902 what business were you engaged in?

A. In 1902, the spring of 1902—or June, 1902, I was elected to Congress from this District.

Q. But what business were you engaged in?

A. Oh, I was in the sheep business; farming and stock raising.

Q. In 1902, you say?

A. 1902, yes.

—. Now what was your firm or were you engaged in business alone, or were you in any firm?

A. In 1902 I was in partnership with Dr. Gesner and Erwin Wakefield.

Q. What was the firm name?

A. Williamson, Wakefield & Gesner.

Q. How long had you been in business with Dr. Gesner in the firm?

A. I think the Doctor bought in 1901.

Q. Prior to that time who if anyone had you been engaged in business with?

A. Mr. Wakefield.

Q. For how long?

A. Since 1899 I think.

Q. And what had been the firm name from 1899 up until the time that Dr. Gesner bought in 1901?

A. Williamson & Wakefield?

Q. Williamson & Wakefield?

A. Yes, sir.

Q. That was the old firm name then?

A. Yes, sir.

Q. Now, then after Dr. Gesner bought in 1901 what was the firm name?

A. Williamson, Wakefield & Gesner.

Q. That is you just added Dr. Gesner's name to the old firm name?

814 A. That is it.

Q. When did Mr. Wakefield go out of the firm?

A. I wasn't there that year but I think it was early in 1903.

Q. Now, up to the time that Wakefield went out in 1903, if it was in 1903, or the fall of 1902, if it was then, up to that time was there any such firm in that country as Williamson & Gesner?

A. No sir.

Q. Was your firm known as Williamson & Gesner?

A. No sir.

Q. Up to the time that Wakefield went out?

A. No, sir.
Q. Never had been known as Williamson & Gesner?
A. No, sir.
Q. It had been known——
A. Better known as Williamson & Wakefield.
Q. Williamson & Wakefield? And then after Gesner went in, as Williamson, Wakefield & Gesner?
A. Yes, sir.
Q. But never up to that time as Williamson & Gesner?
A. No sir.
Q. You say you got into politics in 1902?
A. Well, I was elected to Congress in 1902, yes sir.
Q. Had you been in politics before that time?
A. Well, I had, yes, off and on for a number of years been in some office or other.
Q. In what way?
A. Well in the year 1886 I was elected sheriff of Crook County, In the year 1888 I was elected to the lower House from Crook County. In the year 1898 I was elected to the lower House again. In the year 1900 I was elected to the Senate.
Q. That is when you ran against me?
A. I believe it was.
815 Q. And how many terms did you serve in the Senate?
A. Four years, one term.
Q. One term?
A. Yes, sir.
Q. Then you were elected to Congress before your term in the Senate had expired?
A. Yes, sir. I had an unexpired term to serve out in the Legislature in the Senate after I was elected to Congress. I served one session in the Oregon Senate after that.
Q. Now, Mr. Williamson, during the spring of 1902, who was managing your sheep business in Prineville and in that country?
A. Well, Mr. Wakefield was the sheep man, and Dr. Gesner was *managing your sheep business in Prineville and in that country?*
A. Well, Mr. Wakefield was the sheep man, and Dr. Gesner was managing the affairs of the firm, you might say.
Q. Explain to the jury why about that time you didn't have more to do with the management?
A. In the spring of 1902?
Q. Yes.
A. I was living in The Dalles.
Q. Was that the time you were making your political campaign?
A. Yes, that winter, the campaign came on for Congress and I gave it my personal attention during the whole winter and early spring; in fact almost entirely until June.
Q. When was the convention held that spring?
A. Early in April.
Q. And the election was early in June?
A. Yes, sir.

Q. Do you remember what date in June that year?
A. I think it was the 6th of June.

Q. Now from the time of the convention the 6th of June
816 what were you doing?

A. I was out on the canvass.

Q. Out on the canvass in your district?

A. That is, the last five weeks of that time. I remember the campaign was five weeks in length. The campaign proper.

Q. Now were you up to Prineville at any time during that year, during the spring and summer and fall of 1902?

A. Yes, sir.

Q. Do you remember when?

A. I was up there in April; I would say about the middle of the month. I was up there in June, I was up there in July, and I was up there in late November or early December.

Q. Do you remember whether you were there in February or March or not?

A. I might have been but I don't recall it if I was; I might have been there however.

Q. Now something has been said by Mr. Heney in his opening statement as to your testimony in relation to being out there in June, at the first trial of this case. Now just explain to the jury how that matter came up and what you remembered about it and what you said about it as nearly as you can?

A. Well it was simply like this; in the direct examination Judge Bennett asked me to mention or name the number of times I had been in Crook County in the year 1902; but I hadn't taken any pains to look the matter up. I told him I was out there in July, again in late November and early December and also in April. When it came to the cross examination Mr. Heney put the question to me whether or not I was out there in June. I said I might have been out there in June, but I didn't remember it; I wouldn't say positively whether I was or not. Well, during the two trials—during the interim between the two trials——

Q. Between that trial and the second one?

817 A. The first and second trial, I went out home to The Dalles and looked over my effects there and found sufficient data to prove to my mind that I was there in June. Then when the second trial came along they had a lot of witnesses in here to prove that I was in June, and here I was with my data satisfying myself that I was there in June. That is all there is to that.

Q. Now something about a book being placed in your hands, the hotel register or something of that kind, by Mr. Heney in the cross examination at the first trial. Just explain to the jury just how that was.

A. Yes, there was a register during the first trial. During the first trial Mr. Poindexter's register, the register that he keeps in his hotel was placed up here and I was asked if I wasn't there at that date; that my signature was in that book. I looked at that signature and immediately saw that it wasn't mine. I said to Mr. Heney: "That is not my signature." I asked if he could look over a month

in advance in July he would find my signature. We looked over in July in the register and found my signature. I cited here to the fact that one was an arm movement and the other was a finger movement. I never write with the finger movement, so that it could not be my signature. That circumstance made me a little suspicious that possibly somebody had forged my name in that book, and I said so. I said I would have to look that matter up and satisfy myself whether I was there in June; which I did between the two trials as I told you and then came back on the second trial and told them that I had found data that satisfied me that I was there in June. That is all there was of it.

Q. There was something about the word Prineville opposite the signature. Was that called to your attention?

A. Yes, sir, that was called to my attention and it looked as though it might be my hand writing.

818 Q. What did you tell the jury on the first trial?

A. I told them it looked like my handwriting "Prineville," but the signature was not mine.

Q. Now, as a matter of fact, at the time that matter was called to your attention did you remember of being out there in June?

A. I did not.

Q. Did you have any idea at the time that Mr. Heney called it to your attention that you had been out there in June of that year?

A. No, none whatever. In thinking back over it, I think I was just out there on a rest after the campaign to see my old acquaintances and rest up a few days. I can't find any business that I transacted except a telephone message to Judge Webster, which reminded me that that might have been the trip that I sold a farm of his out there for him. He had been after me for some time to find him a buyer for a farm out there.

Q. Judge Webster here in Portland?

A. Yes sir; below Prineville; and I seemed to have telephoned him on that trip. I find it among my old telephone statements. I must have transacted that business at that time, and that is the only data among my effects that I can find substantiating or proving any business that I transacted on that trip. I certainly did not stay but a few days; although the stage register will show how long I was there.

Q. Now Mr. Williamson there has been some testimony here about some timber claim for which your firm loaned the money out in that country? Now this is your signature which was shown to you (showing witness hotel register).

A. Let me see that. Yes, that is the signature, and on over here a month from that time is my signature I think. Now anyone can look at that signature and they can see that it is not my signature.

819 Q. Is it at all like your signature?

A. No sir; I write with the arm movement.

Q. But the word Prineville looks like yours?

A. Yes sir.

Q. Now at the time that was shown to you, do you remember the

circumstances of the writing of the name, or how it came that the word Prineville was in your hand writing and the other name not?

A. No; but it was a very simple matter when it was once explained by Mr. Poindexter. I didn't know at the time but I heard Mr. Poindexter's testimony, and in fact I talked with him about it.

Mr. BENNETT: You see the signature gentlemen, and the word Prineville opposite (showing book to jury).

The WITNESS: You see the word Prineville is in an entirely different handwriting.

Q. Now there has been some testimony as to how the money was obtained by the firm which was used for the final proofs as these timber claims. You may state to the jury whether you have ever, at any of these trials, or at any time made any contention that you were not interested in those loans?

A. No; that was firm money.

Q. What do you say?

A. That was firm money.

Q. Firm money, and you have never made any other claim or contention whatever?

A. No sir. The reason we used Dr. Gesner's account down at French's was merely a matter of convenience. The doctor had had an account there for fourteen years. I had an account there and we never started a firm account until I think it was May last; and whenever we had any business at French's we always transacted it through the doctor's account. It was an old standing account. That is all there was to that.

820 Q. Now, you may state your memory as to when you first knew about those loans that they were made or were going to be made. First, I will ask this, however. When was this loan in favor of the firm by French & Company, the loan of $6,000, to get the money to make those filing proofs, when was that loan made with reference to the time when those claims were filed upon? Was it made at the same time or when?

A. That loan was made in the fall, if I remember correctly. The claims were filed upon along in the summer, early in the summer.

Q. June or July?

A. I think the loan was made in December, early in December.

Q. Some months after the claims were filed upon?

A. Yes sir.

Q. Now when did you first know that Dr. Gesner was about to or had arranged for loaning people money to prove up on timber claims?

A. Well, the first I remember of that being brought sharply to my attention was when I was out there in July, although I will say this: If I was there in June the Doctor and I must have canvassed it some. But I say I was there in June and we must have canvassed it some.

Q. Although you don't remember about that?

A. I declare I can't recall being there in June, but I was there in June and we must have talked these matters over with other matters some.

Q. Do you know whether you were out to the ranch at all in June or not?

A. No; no, I wasn't. I could recall the trip if I had been. I have gone out there a number of times during the last five years since I have been in the Dalles. I would go out to Prineville when I had business out there.

821 Q. What say?

A. I say, during the last five years that I have been living in The Dalles I have gone out to Prineville a number of times but it is very difficult to recall each time that I have gone out.

Q. Now tell the jury to what extent you knew in The Dalles about what Dr. Gesner was doing about making these loans?

A. Well in talking the matter over, the Doctor was managing affairs out there altogether and had complained about the differences between the cattle and sheepmen growing in acuteness, becoming more acute, and told me that he had resolved on the idea of loaning some money to the timber and stone entrymen; and I told him he was managing it, to go on and do as he pleased; that I would do whatever I could to maintain my part of it. He however, had a farm down in Salem that he expected to sell to loan to these people, but didn't do that. Fall came on and we had to go and borrow some money for some of them. That was briefly the situation.

Q. Now, if Dr. Gesner had made any arrangement about buying the land from any of these people or making any contract with them in relation to the purchase of the land did he give you any information or it at that time whatever?

A. Nothing whatever; that summer——

Q. Has he ever given you any information that he had made any such arrangement?

A. Not until this evidence has come out here and all that he has given them this talk that it might be worth—if they had a deed to it that it might be worth $500 to him; but he never made any such arrangements with me.

Q. Did he tell you that at any time?

A. No sir.

Q. June or July, did he tell you that time?

822 A. No sir; my information was to the effect that it was to be merely a loan secured by note and mortgage.

Q. Was to be a loan?

A. Secured by note and mortgage.

Q. Did you take a timber claim up there that summer yourself?

A. I did.

Q. Whereabouts if you remember?

A. It is the western tier of forties in section 18, I think.

Q. The western tier of forties in section 18?

A. The eastern tier.

Q. The eastern tier of forties in section 18?

A. Yes, sir.

Q. Did your wife also take a timber claim?

A. She did.

Q. Now Mr. Williamson are you acquainted with the timber that is used up in that country for lumber purposes for sawing?

A. Yes sir.

Q. What was the character, with reference to the timber that is used up in that country for sawing purposes, of the timber on your claim and your wife's claim?

A. Just the same character of timber. It is on the same spur of the mountain, the same spur of the Blue Mountain.

Q. What do you say of the character of the timber, as to being good or bad on your wife's claim and your own?

A. It is as good as the average timber claim in that country.

Q. Do you know about these other claims that have been testified about, as to the timber on them?

A. Not except Dr. Gesner's claim, My wife's claim and
823 Mr. Biggs' claim which is adjoining or nearly adjoining mine on the south, and my own. C. A. G[illegible]es showed me at one time where his claim lay.

Q. What do you say as to those claims as to the timber on them?

A. Which ones?

Q. The Biggs claim, and Dr. Gesner's claim and the Graves claim, if it lays as you think it does?

A. Dr. Gesner's claim is the best timber claim in that whole region of country, I would say. I would rather have it than any other timber claim in that whole region.

Q. Can you give the jury some idea of what kind of timber it is on all those claims, and on Dr. Gesner's claim?

A. It is the kind that grows in the ordinary pinery, where the woods are thick. I have asked every cruiser in the summer of 1902, and every timber man I would find, as we were taking up timber fast, I wanted to know what those claims would go, I knew nothing of the business; and I have never had a cruiser out there tell me that those claims would average less, as they ran than a million and a half to the quarter section. I have had a number of men tell me that Dr. Gesner's claim would go about two million and a half, and I calculate my claim will go between a million and a million and a half of good saw timber.

Q. Has wood any value in that country? Is timber of any value for the purpose of wood and posts and so on?

A. Why, it is getting very much so. The Dry juniper that grew on the desert country during the last twenty years has pretty much all been used up and they are now going up into the pines for the wood for Prineville and all the farming community, around Prineville, going into those pine woods.

Q. How is this timber with reference to the convenience to Prineville and the country there generally? Is the country
824 there generally where the settlements are, prairie or timber?

A. It is a prairie country. And these woods are situated on the spurs that run out from the Blue Mountains, the western spurs of the Blue Mountain, and terminates in what is called Lookout

Mountain. It is just northeast of these timber claims, and these spurs are the spurs that jut down from Lookout Mountain and terminate at within I would say, twelve miles of Prineville. That is, the woods cease there and the balance is a prairie country all over.

Q. Is Prineville itself in a prairie country?

A. Yes, sir.

Q. How is this timber situated with reference to the settlement and Prineville and the Farming country in there, how is it situated with reference to them as to convenience as compared with the nearness of other timber supply and wood and purposes of that kind?

A. Well, the Hawkins Brothers have been furnishing the main lumber supply for Prineville. Of course there have been some other mills but they have been the main source of supply of Prineville for the last six years I would say. Their mills are situated just down off the ridge on the Ochoco side from this timber, in the same class of timber exactly and just adjoining the township. In fact, the improvements on the Cadle place or the shearing plant you hear so much about, is built from lumber hauled up from the Hawkins mill. Last Spring, I think Mr. Hawkins moved his mill over onto another spur, but he was asking me this summer when I was out there, what would be the opportunity to locate his mill on this claim of my wife's, and wanting to know if there was any prospect of getting that timber in there. I told him not at present. He said that was the most convenient timber supply remaining to Prineville, that he was very anxious for the mill site.

825 Mr. HENEY: We haven't any objection to hearsay testimony that goes directly to the issue, but I think this is clearly improper. That has been stated here three times, and they have had an opportunity to get the witness here if they wanted to.

Mr. BENNETT: Well, this was shut out in both of the other trials, and the first time we knew that any other rule would be made admitting this testimony was when it was too late to get those people here.

The COURT: Well, go ahead, and omit what is clearly hearsay. Just state what the facts are as to the availability of that timber supply to Prineville and the farming country there, as compared with other places where timber supply can be drawn from, without saying what anybody told you, but state what you know of your own knowledge.

A. I consider it the most available timber supply to Prineville today.

Q. What is the fact as to whether that farming country is or is not settling up all through the country?

A. Oh, very fast, very fast.

Q. I don't think you testified about the Biggs claim, as to what you know of it, and what kind of timber claim it is.

A. Well, it is an average timber claim in that section of country. It has some fair timber on it, and has considerable pine; especially the west side of the claim and north.

Q. About how much is covered with fir timber?

A. There is a grove of fir timber on the north west corner—the way I came to know where the northwest corner was, I was surveying out my own claim.

Q. What is the fact to the relative value of pine and fir timber in that country, and why?

A. The fir timber is very valuable because it is scarce. They use it for coupling poles and hard wood; in fact, it is the
826 only hard wood they have there, is fir; for wagon tongues and the like.

Q. I will ask you if there is any oak in that country?

A. Well I have travelled over that country considerable, crossed the plains, and if there is an oak grub east of the De Schutes plains until you strike Iowa I never saw it.

Q. Mr. Williamson, these photographs introduced in evidence, what do you say as to whether they are fair representations of that country up there?

A. I have looked over those photographs carefully. There is only one of them I can recognize, and I turned that upside down and took several looks at it in different directions before I could recognize that photograph.

Q. Which one is that?

A. That is the photograph that shows the shearing plant.

Q. Is that on a timber claim or on your deeded land?

A. Well, I think the camera was setting on our timber claim, on my timber claim, but it shows the deeded land.

Q. The picture is the deeded land?

A. Yes.

Q. Now Mr. Williamson, as it has been developed in testimony here and you stated I believe, that your wife took a timber claim, and there has been some evidence here as to how the money for that timber claim was paid in relation to the bank account as to being taken out of the bank account, which stood in Dr. Gesner's name, but which was the firm money?

A. I got the money out of the bank for my wife and charged it to Dr. Gesner's account. That was our partnership account at that time.

Q. That was your partnership account?

A. Yes, sir.

Q. What do you say as to your wife's property at that
827 time, just explain how it came that money was taken out of the partnership account and whose money it really was and all about it to the jury; tell them what your property arrangements were with your wife at that time.

A. When I married my wife she had some property near Monmouth in Polk County, and was interested in a farm there. Some twenty odd years ago she sold that interest and put the money into our little affairs.

Q. How much?

A. I think that property brought some twenty-six hundred dollars. And we have always considered what was mine was hers and

what was hers was mine. If I had any bank account or any interest in any bank account or any sheep or any interest in any sheep, my wife had the same interest that I had, and if she did not have a right to the money that was in our bank account, by that same token, I did not have any right either. She had every right to every dollar that I have, morally and financially.

Q. Then your interest in the sheep was really a partnership interest between you and her?

A. Yes sir.

Q. Did you have any more money in the sheep business than she had?

A. I don't think she had a dollar more than she had when she sold her farm and put in her money in our little affairs.

Q. Whose money did you consider it to be that was drawn out there and paid upon her land?

A. It was her money.

Q. Mr. Williamson, Mr. Crane and Mr. Gaylord have testified to your being present, but I think one of them said you took some part in the conversation about their relinquishment on their claims. Did you ever have any such conversation with them, or was you present when such a conversation was had, so far as you know?

828 A. I have heard that testimony during the three trials, and I will repeat what I said upon the two occasions prior to this, that I never had any such conversation that I can recall. I never remember of seeing that man Gaylord until he took the witness stand here. He might have been up in the woods at one certain time when I was there, but I don't remember of seeing him there.

Q. You mean the time when Watson was up there?

A. Yes sir. Crane, however, might have been in our office some time when I was there; I would not say that he was not.

Q. What do you say as to whether you ever had any conversation or such a conversation with them or either of them, as has been related here?

A. Never, no sir.

Q. What do you say as to whether these two gentlemen were in your office or in Dr. Gesner's office, and got their money together when you were present?

A. I am very sure that never occurred in my presence.

Q. Have you seen these checks?

A. Yes, sir.

Q. What do you say as to whether you were present at the time Mr. Crane got his check, if it was on the 11th of December, 1902, the date of that check?

A. I don't think I was in Prineville on that day. If I was not in Prineville I could not have seen him get the check. I could not have been present, am pretty sure I was not in Prineville on that day.

Q. What is it makes you think you were not in Prineville on that day.

A. About the 9th one of the hands came in and reported that my

brother-in-law, Wakefield, had not been seen at Bear Creek Butte for three or four days, and he had gone over to the Crooked River ranch, some twenty miles to see if he had turned up there. Failing to find him at the Crooked River place, he came direct to
829 Prineville and told us that Wakefield was missing. There was a heavy snow storm on at the time. I immediately got a rig together and got a man or two to help me, to go along with me, and went out and made a two days' search for Wakefield and found him over South of Bear Creek some thirty miles from Prineville, coming in on foot, off the desert, with a bunch of sheep. He had followed a band that was going through the country, that had some of his sheep in it, half way across the desert to Silver Lake, and had taken the sheep out, and coming back his horse got away from him and he staid with the sheep afoot and we met him coming in. I came in on the 11th, getting into Prineville about eight o'clock at night.

Q. On what day?

A. On the 11th of December.

Q. At what hour does the bank close there?

A. At three o'clock in the afternoon.

Q. You got in at eight o'clock?

A. Yes, sir. I started out on the morning of the 10th, early, came in on the night of the 11th.

Q. Is there anything else that makes you remember the day?

A. Yes sir.

Q. Go on and tell the jury, all about that.

A. Our office is in the lower story of a two story building. Immediately overhead is the Masonic Lodge Room, and it so happened that on that particular night, there was an election of officers of the Eastern Star, and I had no sooner sat down in the office with Dr. Gesner, than two of the sisters of the Eastern Star came to the door and insisted that I go up and attend lodge; spoke about having some supper up there, etc., being election night. I showed them my muddy and exhausted condition I had been riding horseback
830 all day and was not accustomed to riding horseback, and I was weary besides, and I told them that I had not been to supper yet, I had to go over to see Mrs. McDowell about getting some supper, the hotel dining room was closed. I remember that incident perfectly well.

Q. Now Mr. Williamson you have heard the testimony of Mr. Watkins and Dr. Gesner and some other persons about a circumstance of your being up there in the timber, and some conversation that took place there. But first, before we pass to that, I will ask you whether or not you were up there in the timber and up at the shearing plant in July.

A. Yes, I was up there in July.

Q. You were up there helping about the survey?

A. Yes sir; I wanted to go up and take a little outing and see the sheep; I had not seen them for a good while, for over a year. The boys had been dipping them that year, they had had the scab and

I wanted to see how they looked afterwards, and if they were cured, and Dr. Gesner wanted to do some surveying, survey out some land he had in that township, and some road land we had leased, and did not know where the lines were, and — out timber claims and so on, and locate the township line.

Q. Some that he claimed he was going to loan money on?

A. Yes, sir; our own timber claims especially, and then the Doctor wanted to look up the line of some timber claims he was going to locate some people on; and I remember another thing, we wanted to see about was the eastern township line. There was some talk of a dead line being located over there and we wanted to find out where the eastern township line was.

Q. Did you assist in surveying up there?

A. Yes.

Q. How much, and at what time?

831 A. Three or four pieces a day. It was pretty hot weather and we didn't do much surveying. We ran across lots any way to get across the country. It was pretty hot weather and I was carrying one end of the chain, and I was soft, and I was looking up shade part of the time.

Q. Do you remember the occurrence of your being sick at camp one half day, when Henry Beard was out helping to make the survey?

A. Yes sir; that was over near the north corner of the township.

Q. Mr. Beard said something about Dr. Gesner's saying something about a particular quarter section not being a good quarter section, and it had a spring on it, or something of that kind. Do you remember anything about that?

A. Well, I had a sore hand that day, I got it hurt and it was inflamed some, and I thought I better lay over that afternoon, and they went down in a northerly direction and surveyed around, and came back in the evening.

Q. Do you remember any such conversation as that testified to by Mr. Beard?

A. No, I did not hear any such conversation as that. In fact, there were creeks putting down out of that coutnry—we were right on a creek where we were camped, or within a hundred yards of it.

Q. How is that country generally as to there being a scarcity of water, or otherwise?

A. Why it is a well watered country; it is a water shed.

Q. How about these different sections Morrow & Keenan applied for that summer and finally got some time during the summer? What was their situation as to being watered?

A. They were just like the other sections, just like every other section, And a creek certainly would not stop when it came to the edge of an even section; it would run on through it. There is a water shed putting down from every direction in that township except the east. Creeks run to the north and to the south

832 off that spur that runs out there. Coming down this side of the mountain, little branches foot down in the mountains

every direction. Of course those branches get low in the summer or along the first of September, but there is water all over that country; it is a well watered district.

Q. What do you say as to whether there is any section in that country so far as you know that has not got water on it?

A. There might be a section occasionally that has no water on it, Judge, in the first of September, but I will say all through the heat of summer, there is water there everywhere. Along in September, take this year, there was not much snow fall last winter, and the first of this month I think water, from reports, was as scarce in there as it has ever been. In an ordinary season there is water everywhere; it is a water shed and branches break out everywhere.

Q. Where is the water and spring with reference to the canyon? Is the water generally on the hills or in the canyons or where?

A. It is like any other water shed. Here will be a canyon cutting up onto a water shed, and at the head of the canyons will be some springs, and water from those springs runs down in the canyons, emptying into other creeks and finally form a large creek, just like any other water shed.

A. I don't think you answered my question directly. Tell the jury directly where the water supply is generally in that country, with reference to the canyons and the hills.

A. Why, I don't understand your question if I did not answer it.

Q. I will put the question this way. What I want to know is whether the water supply there is in the canyons or on the hills?

A. Oh, it is in the canyons of course; it does not run over the tops of the hills.

Q. How is the best timber in that country with reference
833 to the canyons and hill tops, the ridges?

A. I think it is inclined to be more thrifty growth along the water courses.

Q. More thrifty along the water courses?

A. Yes sir.

Q. Was it the same trip you were up there that you were talking about when you were sick and did not survey one half day, was it that same trip that Watkins was up there?

A. Yes.

Q. Do you remember the circumstances of Watkins being up there?

A. Yes, sir.

Q. Do you remember whether Gaylord was up there at that time?

A. Well, he might have been there, but I don't remember seeing him. We were camped along the creek among the willows, we were above and the other people were down below.

Q. Was Gaylord a man you are acquainted with?

A. No, sir, I am not acquainted with Gaylord.

Q. Were you acquainted with Watkins?

A. That is the first time I ever met Watkins to know who he was. I had seen that man before but I had not the name and the man associated until that time.

Q. You knew of him by reputation?

A. Yes.

Q. You heard the testimony of Dr. Gesner and Watkins about there being some incident there about the writing of the numbers of that section, and perhaps of Mr. Gaylord's claim in the book, and about your having said that Dr. Gesner better let you write it because nobody could read it after it got cold. What do you say about that?

A. Well, it was not in answer, if it was not for the Doctor telling that story—I don't recall it, but he tells it in a way that it sounds so much like some of my nonsense, that I am inclined to believe I did write some numbers in that man's book.

834 Q. You have no memory in relation to that matter yourself?

A. No, I don't remember; I don't recall anything about it.

Q. What do you say as to whether you have any memory about having had any talk with Watkins at that time about the claim?

A. Oh, I saw Watkins there and there was very little talk. We just took lunch on the creek there and went on; found them there and left them there.

Q. Do you know, Mr. Williamson, whether there was any talk up there about young Starr buying into the business or not, about 1902?

A. Oh, I have talked with the boys repeatedly; my nephews, in fact, I have been trying to get them to buy a business in the concern there, because they are good sheep men.

Q. I am not asking you about now, but at that time, away along in 1902.

A. I think I had a talk with the oldest one, yes sir. The youngest one I did not see that summer. He was over in the cascades.

Q. I believe you stated that you had not been up there very much that summer. Now, Mr. Williamson, Mr. Brandon, who was called as a witness here on the stand, was asked by Mr. Heney if he had testified at the first two trials. When did you first learn the whereabouts of Mr. Brandon?

A. I never heard of the man until Mr. Duncan and others here, Mr. Ray and others, testified about him being up there. I did not know where he was, did not know anything about the man.

Q. You didn't know there was such a man?

A. But during the second trial, along toward the latter part of the second trial we were telephoned from Prineville that the man was in Prineville. I think Mr. M. R. Elliott sent us a telephone message from Prineville that the man was in Prineville, but it was too late to get him down here at the last trial, it was the closing up of the last trial, I think.

835 Q. Mr. Woods has testified to having had a talk with you about the matter of an application—some conflict of an application between you and the Morrow & Keenan people for some land in that country. You heard his testimony didn't you?

A. Yes, I heard it.

Q. Just tell the jury whether or not you knew at the time that these timber filings — being made in June and July that Morrow & Keenan were to get those lands?

A. No, I really thought we would get those lands all summer that summer; I didn't know but what we had them really, that is, I knew we did not have them but I thought that we would get them. I had spoken a number of times to Colonel Robert Mitchell, their office man here——

Q. Office man to whom?

A. To the Willamette Valley & Cascade Wagon Road Company.

Q. For the Wagon Road Land?

A. Yes sir, and I told him we were going to apply for them just as soon as we could look them up and see what sections we would like to have. And then it ran a great deal as Mr. Woods stated it the other day; I recalled it as he stated it, he stated the case just about as I remember it. I was in the office and Mr. Mitchell led me to believe there was some hitch in the agreement and contract between them and Morrow & Keenan and that we would eventually get the land; he would let me know and the like of that. So I did not know during the entire summer for certain, whether Morrow & Keenan had the land.

Q. Do you remember whether they informed you about this misunderstanding Mr. Wood testified about, about the matter of the fencing and the time of the lease?

A. Yes, sir; Mr. Mitchell said to me that Morrow & Keenan would not fence the land, and that that was, as I understood it, the difference between them; so much so that they could not
836 close up with Morrow & Keenan.

Q. What was the arrangement in case they did not close up with Morrow & Keenan?

A. He was to notify us and so wrote on the plat book which shows

Q. Was there any other time, any kind of feeling upon your part, towards Morrow & Keenan about these leases?

A. None in the world; they were the best of neighbors.

Q. What had your relations always been with Morrow & Keenan?

A. The most friendly nature. I sheared their sheep for them in 1900 at my shearing plant and also in 1901, and we have always been on the very best of terms.

Q. Mr. Campbell Duncan has testified to a conversation which he says took place between you and him, as I remember it, at the Imperial hotel, after the second trial of the case. Do you remember Mr. Duncan being up there?

A. Yes, sir; it was after the second trial as I remember. He came up there and said he was going home and wanted us to pay him some money on account. He had been building some fence for us and *and* he had not completed the fence yet and we had not finished paying him. I let him have some money and asked him to sit down and we engaged in conversation, talked over a number of things.

Q. You may state whether or not in that conversation, you told him as stated by him that those people had throwed it into you and that you would throw it back at them or that it would be throwed back at them or anything of that kind whatever.

A. No, Mr. Duncan is mistaken about that, because that is not a saying of mine. I never throw it into anybody, and I never get

it thrown into me; I never use that expression. We talked awhile, and the case came up of course, and I remember saying to him that the witnesses seemed to be frightened or were so under the thumb of
Mr. Heney that they would say yes to anything he wanted
837 them to say or answer readily anything he wanted said, but whenever we asked them a question they could not find an answer for it. Especially if it happened to be in our favor. I remember having such talk; said there was no use of us acting like wild animals, because we were having a lot of trouble, that we all had to live in the same community in the future, like we had in the past. Some such conversation as that.

Q. Did you make any kind of a thrust towards the witnesses at all, in any way?

A. I never thought of such a thing, never thought of such a thing.

Q. Was your talk there with any idea of influencing Campbell Duncan in his testimony in any way?

A. Not in the least. We sat there and talked just as we always have.

Q. What was the fact as to whether he had testified already?

A. Certainly, he had testified already and was going home, as I understood it, and wanted a few dollars to go home on.

The foregoing is the whole of the testimony of the aforesaid witness John Newton Williamson introduced at the trial upon his direct examination.

838 Upon his crossexamination the following proceedings were had.

Said witness was shown a map prepared by the Government upon which a line of proposed Forest Reserve, withdrawn as such reserve on July 28th, 1902, was marked and the witness was asked, "Mr. Williamson, do you know where the lines of the Forest Reserve cross directly north of 15-19? Do you know where the south boundary line of the Forest Reserve is?" To this question the defendants objected as irrelevant and immaterial, and tending to drag immaterial issues into the case and not proper cross examination. Whereupon the District Attorney explained, "By Forest Reserve I mean the lands withdrawn for that purpose already withdrawn and withdrawn on July 28th, 1902." Whereupon the objection was over ruled and the defendants each of them excepted to said ruling and the witness answered, "What was the question? The Forest Reserve Line? Q. "The south boundary of the Forest Reserve," to which there was the same objection ruling and exception on behalf of each defendant. A. I couldn't say. There has been so many changes in there and the last change that was made by the Department there was a lot thrown out just north of 15-19 and I never did figure out just what portion of the original reserve area was thrown out and what was left in." —. I asked you about that that was recommended and withdrawn on July 28th, 1902, to which there was the same objection, ruling and exception. A. I think it was about the middle of the section, just as that map shows. Q. The middle of 14? To which there was the

same objection, ruling and exception. A. Of the township, yes. Q. of 14? A. Yes, sir. Q. In 14-19? A. If my memory serves me right that is it. Q. It ran through the middle of township 14-19 and then ran along the east line of township 14-18 to the north line of township 14, and then west along the north line of township 14?
839 Same objection ruling and exception. A. Something like that, but I think that was all thrown out. Q. Oh, I can show you exactly how it stands if you want to see it. Threw out the timber and school sections that people had been taking up, didn't they? Same objection, ruling and exception. A. I really don't know. I have heard a great deal about that, but I don't know what they finally did. Q. Didn't it affect some that you had? Same objection, ruling and exception. —. No, sir, not an acre, not an acre. Q. It didn't? A. Not an acre sir. Q. Didn't you have an interest in some with Boggs. Objected to on the same ground as immaterial, irrelevant and not proper cross examination. Objection overruled, exception allowed. Q. "In the neighborhood of the reserve, the lines of the reserve, which was withdrawn on July 28th, 1902, didn't you have an interest in some school sections with Boggs and Gesner. Same objection, ruling and exception. A. Not in that section of the country. Q. Did you have any in Crook County in connection with Boggs and Gesner? Same objection, ruling and exception. A. I am not certain. There might have been a section or two. There might have been some. I have forgotten where that land is, but I think there was some next the line. Q. Boggs secured the applications for those in Prineville, for you in July, 1902, didn't he? Objected to as immaterial, irrelevant and not having anything to do whatever with the case, and not proper cross examination. Objection overruled and defendants excepted, exception allowed. A. No one ever secured any applications for me. Q. When you were in Prineville in June 1902, you say you don't remember doing any business there except that of selling a piece of land, perhaps for Judge Webster? A. That is all I can recollect. Yes sir. I don't say that I didn't transact some other business, but that is all I can find any date to bring to my recollection. Q. Didn't you discuss with Dr. Gesner the advisability of securing section 16, township 15-19 school
840 lands, at once on account of Morrow & Keenan having secured those leases of those odd sections? A. No sir. Q. You did not? A. I say we might have discussed the advisability of getting that section of land but not to get ahead of Morrow & Keenan, or that there was any spite between Morrow & Keenan and us. Q. Didn't you agree with Dr. Gesner that he could secure people to take up that section 16 and pay for the land out of the firm moneys, in June—in June while you were there—in June of 1902? Objected to as being immaterial and tending to drag in other matters not involved in the case, objection over-ruled and defendants except. A. I do not remember anything of the kind. Q. Didn't you agree with him that he could furnish the money to pay for the northeast quarter of section 16 in 15 S. of Range 19 E. for Mary A. Swearingen, and wasn't the money furnished, with your knowledge,

on June, 24th, 1902 $200, and isn't that the $200 that appears in this bank account of Williamson, Wakefield & Gesner of that date? Objected to as being immaterial, irrelevant and not proper cross examination and tending to drag outside and collateral matters into the case. A. I don't remember anything of the kind. I don't recall it. We may have done it. We might have talked of those matters. I don't say we didn't, but I don't recall it. Q. Didn't you agree with Dr. Gesner that he could pay $50 to any applicant for 320 acres, $25 for each quarter, to secure that section 16? Objected to as immaterial, irrelevant and tending to drag collateral matters into the case, and not proper cross examination. Objection overruled, defendants except. A. I don't remember that, I don't remember of making any such agreement, with Dr. Gesner.

841 Thereafter on cross examination the following question was asked of said defendant, "Then Mr. Williamson, on June 24th, I called your attention to the entry on the debit side of Williamson, Wakefield & Gesner's account of the First National Bank of Prineville, Oregon, and entry of June 24, 1902; $200; and I call your attention to a certified copy of a letter by J. J. Smith, County Clerk at Prineville, to M. L. Chamberlain, Clerk of the State Land Board, inclosing an application to purchase State land of Mary A. Swearingen and a draft of $200 in full payment for the same. Now, with those two things to refresh your memory, didn't you have a talk with Dr. Gesner prior to June 24 and in June while you were up there on that trip in which it was agreed that he could use the firm money and secure somebody to apply for section 16, township 15-19 from the State for school lands and pay a consideration to the person for filing upon it? Objected to as immaterial and irrelevant and not proper cross examination especially of a defendant on the witness stand, and as being if admissable at all, a part of the government's direct case. But the objection was overruled by the court and the evidence was admitted as bearing upon the question of knowledge and pre-existing design, system or scheme and for no other purpose, to which overruling and said objection the defendants each excepted and their exception was allowed. A. I don't remember anything about that transaction in general, There might have been something said about it but I don't recall it. Q. I call your attention to a certified copy of a letter from Dr. Gesner to M. L. Chamberlain, Salem, Oregon, date June 23, 1902, inclosing a check for $80 for payment on the west half of section— Same objection, ruling and exception. A. I never saw the letter

842 before. Q. Do you remember having any conversation with Dr. Gesner in June, 1902, in relation to his having his sister Mrs. S. M. Jerowe take up a portion of that section 16 in township 15-19 for the firm? Same objection, ruling and exception. A. I don't remember anything of the kind having occurred when we were then in June when I was there in June.

843 The following is all the testimony of the aforesaid witness John Newton Williamson, except his direct examination heretofore set out in full, and the following together with said direct examination is all of the testimony of the aforesaid witness Williamson introduced at the trial.

Cross-examination of witness JOHN NEWTON WILLIAMSON:

By Mr. HENEY:

Q. Where was it you say you went to look for this brother-in-law of yours?

844 A. At Bear Creek Butte, south of Prineville.

Q. How far did you go?

A. It is twenty-six miles to the Buttes and we went over the Buttes something like ten miles farther, ten or fifteen.

Q. How did you go?

A. We took a hack and two horses.

Q. Who went with you?

A. Mr. Kitching and Mr. Ernest Starr.

Q. How long did it take you?

A. We went out the 10th, started from Prineville, early on the 10th, we went out to Bear Creek Butte, and Ernest Starr went up to one of our places there and I took my horse and went down four or five miles to the East and staid all night with Lee Kitching to see if I could get him to take his horse and go with me. That night of the 10th that was and next morning we started early and met Ernest Starr, he was to come down to the road and wait for us, or if we got to the road first, we were to wait for him, and then we all went together over the Bear Creek Butte; and I remember we had a severe day of it in a snow storm, and when we got on the other side, over the summit, we found a herder there and he told us of having seen Wakefield the night before; that Wakefield had left the sheep and come in to get his supper, and went back to the sheep, and so we turned and went back; and when we got over the mountain on the other side, I took one of the horses and rode to Prineville that night.

Q. What time on the 10th did you start?

A. Why, I don't remember; we started in time to get to Bear Creek Butte that night.

Q. Well, can't you tell about when?

A. Mrs. McDowell perhaps, can tell you more about that. She is the hotel keeper and I had breakfast at the hotel.

845 Q. You started immediately after breakfast?

A. I think we did; we had that twenty-six mile drive to make.

Q. Do you remember talking with anybody before you started?

A. No, I don't.

Q. How do you fix it as being on the 10th then?

A. I fix it by—I don't fix it at all, only by remembering and then the time book at the hotel shows that those were the two days that I was away, and then the night of my return having this experience that I related with the Lodge people, about the lodge people coming down to see me, is all. No, I would not say that I remember that those were the two days, three years ago. I remember the incident, and then the fact of the time book at the hotel showing that those were the two days, makes me believe that those were the two days that I was out on that trip.

Q. The time book shows that you were there to breakfast?
A. I think it does.
Q. And it does not show you there for dinner, but it shows——
—. — me there for supper on the 11th.
Q. And breakfast on the 10th?
A. Yes.
Q. And your best recollection is that you started pretty early.
A. Well, I would only say that it is an uphill drive. There was a big storm on and we must have started pretty early in the morning to make that drive of twenty-six miles. I can remember of getting to Kitching's house about dusk.
Q. Do you place that in any way with reference to the time of day you proved up?
A. No, I cannot.
Q. Have you any positive recollection in regard to whether you did or did not see Crane and Gaylord in your office together any day?
846 A. I say I do not remember of those two men ever being in the office the same day. I am pretty sure they were not when I was there.
Q. But you do not claim that your memory is any better on that than it is in regard to not having seen Gaylord up in the timber, do you?
A. No, not a bit.
Q. And you are pretty certain that you did not see him up in the timber aren't you?
A. No, I don't remember of seeing him up there.
Q. No, but yet, from what you heard of Dr. Gesner's testimony and Gaylord and Crane's testimony, you are pretty certain that you did see him aren't you?
A. Mr. Watkins yes. The Watkins feature of it.
Q. No, but Gaylord.
A. Well, if Gaylord was right there where Watkins was, when I wrote in the book——
Q. You wrote Gaylord's description in Watkin's book?
A. If he was standing right there, I must have seen him.
Q. Dr. Gesner does not dispute but what he was there.
A. I think not.
Q. He testified that you did write Gaylord's name in there also?
A. Yes sir.
Q. Yes, you have no recollection of seeing Gaylord?
A. No, I remember of stating here in the Court Room——
Q. Now, have you any more positive memory of not seeing Gaylord on the other occasion in your office?
A. No, about the same.
Q. Now, upon the first trial did not Mr. Bennett ask these questions of Ernest Starr, and didn't you prompt him to ask these questions—go over to him and ask him to ask these questions, and didn't Ernest Starr make these answers: "You were talking about
847 going into partnership with Williamson, Wakefield & Gesner at that time, wasn't you? A. There was nothing said to me

about it. Q. What say? A. I don't think so. There was nothing said to me about it. Q. Wasn't you talking about buying Wakefield out——

Mr. BENNETT: We object to this being read in the presence of the jury. These questions are immaterial, incompetent and not proper cross examination.

Objection overruled. Defendants except.

Q. (Continued.) "Q. Wasn't you talking about buying Wakefield out? A. I was not. Q. Was there any talk between you and any of those people about buying any of those people out at all? A. I think they talked to my brother, but I don't think there was anything said to me. Q. Did you not talk about it at all? A. Not that I remember."

Do you remember hearing him so testify on the first trial?

A. Yes sir.

Q. Now after he had so testified, didn't you have a conversation with him in which you told him referring to his testimony on the stand, and upon that point, that he had lied?

Mr. BENNETT: I suppose our objection goes to all of this, as immaterial, incompetent and not proper cross examination.

Objection overruled. Defendants except.

Q. Well, I don't know that I told the boy he lied in so many words. He may have considered I was trying to make him out a liar, but I did not say you lie, in so many words.

Q. It was in regard to this testimony, was it not?

A. We were canvassing several things, I don't know but that was one of the things we were talking about, one of the features of his testimony.

Q. Now, on the second trial did you hear him testify this
848 way in answer to Mr. Bennett: "Q. Now, Ernest, you say you have never been on the witness stand until the last trial of this case? A. Never was. Q. And this stat-ment that counsel asks you about that you say was shown to you by Mr. Neuhausen, just before you went on the stand the other day, wasn't it? A. Yes, sir, I was in their room. They called me in there. Q. Called you in there? A. And were talking. Q. Yes, and was talking to you, and read that statement to you or had you read it. Now, at the time *at the time* you filed on this timber claim, don't you remember now, Ernest, that you were talking, or do you remember, that you were talking about buying an interest in the business up there. A. I remember him speaking to me once since the other trial? Q. What say? A. I remember about some one speaking to me afterwards, after the trial. Q. You didn't remember about that at the other trial? A. I do remember one. Q. Do you remember who it was you were talking to? A. Yes, sir. Q. Who was it you were talking to about buying an interest in the business? A. Mr. Williamson. Q. Mr. Williamson. How long was that before you filed on the claim? A. I don't remember just how long, within six or seven months maybe. Q. Now, didn't you and your brother both — in figuring on buying in there together? Hadn't you figured at one

time of buying a quarter interest in there or of buying Mr. Wakefield's interest out, which was a third? A. I think there was some talk of that. Q. There was some talk of that. Now wasn't it talked with Dr. Gesner that if you wanted to buy a timber claim, that if you didn't buy into the firm, and wanted to sell your claim, he would buy it from you? A. I don't remember just the talk."

Do you remember of his so testifying at the second trial?

A. Yes sir; I remember of his testifying to something of that kind.

849 Q. Now, you say you did not have any talk with Ernest Starr, but you did have with Chester Starr? You did not see Ernest in 1902?

A. That particular summer, yes sir. He was over in the Cascade Mountains that summer.

Q. This conversation that you referred to with C. E. S. Woods, he did not testify to that on either the first or the second trial did he?

A. Who?

Q. C. E. S. Woods, the conversation that he testified to, as having had with you?

A. No, I think this trial is the first time.

Q. This trial is the first time he testified to that?

A. Yes sir.

Q. And it is the first time you testified to it?

A. Yes sir. I recal- it as he stated it on the stand here; I remember it.

Q. When you got back there in June, you went right on up to Prineville didn't you?

A. After the talk with Mr. Woods?

A. Yes.

A. Well, I expect it was about that time of the year.

Q. When you got up there didn't you have a talk with Mr. M. R. Elliott, the agent of the company up there, in regard to it?

A. I expect I did. I don't recall it, but I might have had.

Q. Didn't he tell you he had considered it as settled, that this land would go to Morrow & Keenan, that he had given the certificate to Morrow & Keenan to that effect?

A. No sir, I don't remember of his having told that. He might have.

Q. Didn't you tell him that you wanted if possible, to get Section-17 and 25, and you thought you could fix it up with Mor-

850 row & Keenan, that you would see Morrow on your way back here?

A. I remember of telling him I wanted it so arranged down there that there would be no difficulty between Morrow & Keenan and us, because I would rather give the whole thing up than have any hard feelings with them.

Q. Do you remember telling him you would see Morrow on the way back?

A. I might have told him that.

Q. That you would try to get them to let you have 17 and 25?

A. I know we worked back and forward until—well, along in the summer, to get that arranged.

Q. And they did agree to let you have 17, did they not?

A. Well, I don't remember of his agreeing with me. I think the boys up in the mountains arranged it so that our sheep had the use of 17. We might have. But I don't remember of Morrow and I making any arrangement about it. I rather think we left it to the men up in the mountains with the sheep, to divide up the range.

Q. Didn't you try to get him to give up section 25 in 15-19 to you?

A. Well, that was among the rest applied for I think.

Q. Do you remember having any talk with Morrow & Keenan, about giving up 25 to you?

A. No, I don't remember any talk about it. Section 17 was the nearest one to us and that was the one I was most interested in.

Q. But didn't you want section 25, because that is the best feed ground on the east side of the river, close to the river, that leads up to the mountain? That is to Lookout Mountain, you feed up toward the mountain, don't you?

A. Oh, twenty-five, I never cared anything about. It is over in the cattle country.

Q. As the summer runs on don't you feed up toward the
851 mountain going north, up toward Lookout Mountain?

A. No, twenty-five is not on the mountain; twenty-five is out near the bunch grass.

Q. I did not ask you that. I will give you plenty of opportunity to answer that. In feeding, don't you feed north, towards the mountain, during the summer?

A. Why certainly *certainly* as the summer advances, we go up the mountain.

Q. And that was all an open country up there, and both cattle and sheep used it?

A. What country are you speaking of?

A. Up towards Lookout Mountain?

A. No sir.

Q. It was not?

A. You mean an open country, a prairie country?

Q. No, I mean it was open to both sheep and cattle, and no line drawn up there?

A. Well there were lines made in there—I have forgotten what season, there have been different dead lines made in that country at different times.

Q. Didn't the dead line, the line agreed upon between the cattle men and the sheep men in 1902, take up Horse Heaven Creek, then run off to the northeast from Horse Heaven Creek to the north east along the road that ran up south east of Lookout Mountain, and that carries just about through the corner of Section 16, township 15-20?

A. Whatever dead lines were made in there that season, Mr. Heney, I know nothing of, because I was in The Dalles, our hired men were handling the sheep in there—or Mr. Wakefield rather, with the hired men.

Q. And Gesner never communicated to you where the lines were?

A. No, I — nothing of what lines were made in there
852 that season. My recollection is that we were trying to establish the township line, eastern township line.

Q. Then why didn't you run it when you were up there. You didn't run that eastern township line, did you?

A. Oh, we ran a little of it.

Q. How much did you run?

A. We ran all along 25. We ran from the center of 25 clear through to—I don't remember the section, but three miles along the section line, all that we were interested in.

Q. Interested how?

A. That is, interested in seeing where it would lead us, so in the future, when we come to make this dead line, we would know where the township line was.

Q. If you wanted to make the township line the dead line, why didn't you run it all the way to the north end of it on that township?

A. We ran to the head waters of the Horse Heaven and ran to Ochoco I think, and we cared nothing about the Ochoco side because there were others interested over there.

Q. The fact is there never was a line, any dead line from the head waters of the Horse Heaven north?

A. No, I think you are right about that?

Q. To Lookout Mountain, isn't that right?

A. No, I don't think there ever was; we expected something of that kind, but I don't think it was ever perfected.

Q. Now, here is a map of the State of Oregon; it has some writings on the side, but we don't care anything about them; they can be cut off; the writings refer to these colors in here of forest reserve; tell what they are.

Mr. BENNETT: There are a lot of matters, your Honor, on the map that ought not to be on a map; it seems to me, for the purpose of getting a map of that country—we have no objection
853 to a map of the country; this is a Government map, and seems to have been prepared with reference to this case. If it is admitted at all, the writing on the map should be cut off, and we object to the map anyway.

Mr. HENEY: I have already stated that I am willing to cut the wiring off. The map wasn't prepared with reference to this case; it was prepared with reference to the Blue Mountain Reserve.

Mr. BENNETT: I don't know about that; anyway, it seems to me it is not a fair map, and we object to it as not a proper map and as being unsupported in some particulars by any evidence.

Mr. HENEY: We can furnish the evidence from this witness.

Mr. BENNETT: It seems to me that there are plenty of maps that are prepared by disinterested parties that can be introduced.

Mr. HENEY: There is nothing on here by the representation of Forest Reserve as recommended by the Geological Survey.

Mr. BENNETT: I don't know how the recommendation of the

Geological Survey can bind us in any way, even if they were established.

Mr. HENEY: I was mistaken about that being prepared especially for any case; it belongs to the General Land Office. We can cut that writing off, and put it on again!

COURT: I don't see how you can object to that; the marking cannot have any revelancy to the case; if you have one that has not the markings, why, well and good; let us have it.

Mr. BENNETT: If it is conceded that that has no reference to this case, in any way, and no use is to be made of it in any way——

Mr. HENEY: There won't be any use made of it unless
854 some questions in regard to it are asked and allowed; if they are not allowed, there won't be any reference to it.

Mr. BENNETT: It is very easy to get a map of the state, your Honor, which has not the objectional features on it.

Mr. HENEY: Well, I have a right on cross examination, to ask this witness—he has testified about his knowledge of the general character of that country, the timber around there, and so on—I have a right to ask him as cross examination what he knows about the lines of the Forest Reserve in that neighborhood.

COURT: I thought you were offering it as a sort of agreed proposition between you, as a map of the state.

Mr. HENEY: I am going to ask him some questions now on it, and so far as offering the map is concerned, that was the understanding; the map without anything else on it.

Mr. BENNETT: We have no objection to a map without anything else on it, just an ordinary map of the country, showing the mountains and townships lines and that sort of thing.

Mr. HENEY: If I had such a map here, I would ask him if he did not know where the lines of the Forest Reserve were, as a part of his cross examination, among other questions.

COURT: Are those lines close to the property?

Mr. HENEY: Yes, sir. They are. The south line of the reserve as recommended, is in the middle of the township above; where he has just testified that the timber is being taken off, or has been, for a sawmill, and is of the same character as this timber on this township.

COURT: I don't see how the use of the map can in any way be prejudicial to the rights of the defendant on cross examination.

855 Mr. BENNETT: I don't know about that; I don't know whether it will be or will not. I think that probably it will not but at the same time, we don't want a lot of incompetent matter to be introduced here which may possibly prejudice the defendants, at some time, in the case, and you cannot get those things out, your Honor; when you get a thing before the jury once, it is there, and the more you try to get it out the more you make it there; that is a fact that every lawyer well knows. We object to the map as incompetent, self serving on the part of the Government, not a fair map of the country, showing things that do not exist, never have ex-

isted, and not proven in any way to be a fair map of the country, and as not being any proper part of cross examination.

Objection overruled.

Defendants except.

Q. Mr. Williamson, do you know where the lines of the Forest Reserve cross directly north of 15-19? Do you know where the south boundary line of the Forest Reserve is?

Mr. BENNETT: We object to that as irrelevant and immaterial and tending to drag immaterial issues into the case, and not proper cross examination.

Mr. HENEY: By Forest Reserve, I mean the lands withdrawn for that purpose, already withdrawn and withdrawn on July 28th, 1902.

Same objection.

Objection overruled.

Defendants except.

Q. Do you know about where the line is?

A. What was the question—The Forest Reserve Line?

Q. The south boundary of the Forest Reserve?

Mr. BENNETT: I would like to have our objection go to all of this matter.

856 COURT: To all reference to the map?

Mr. BENNETT: To all reference to the map and all questions in relation to the matter of the Forest Reserve lines.

COURT: It may be considered as extending them to that.

A. I couldnt' say. There has been so many changes in there and the last change that was made by the Department, there was a lot thrown out just north of 15-19, and I never did figure out just what portion of the original reserve area was thrown out and what was left in.

Q. I asked you about that that was recommended and withdrawn on July 28th, 1902.

Same objection.

A. I think it was about the middle of the section, just as that map shows.

Q. The middle of 14?

A. Of the township, yes.

Q. Of 14?

A. Yes, sir.

Q. In 14-19?

A. If my memory serves me right that is it.

Q. It ran through the middle of township 14-19 and then ran north along the east line of township 14-18 to the north line of township 14, and then west along the north line of township 14?

A. Something like that, but I think that was all thrown out.

Q. Oh, I can show you exactly how it stands if you want to see it. Threw out the timber the school sections that people had been taking up, didn't they?

A. I really don't know. I have heard a great deal about that, but I don't know what they finally did.

857 Q. Didn't it effect some that you had?

A. No, sir. Not an acre. Not an acre.

Q. It didn't?

A. Not an acre, sir.

Q. Didn't you have an interest in some with Boggs——

Objected to on the same ground; immaterial; irrelevant; not proper cross examination.

COURT: He may answer. I cannot tell yet whether this is relevant or not?

Mr. BENNETT: We take an exception.

Q. In the neighborhood of the reserve, the lines of the reserve, which were withdrawn on July 28th, 1902. Didn't you have an interest in some school sections with Boggs and Gesner?

A. Not in that section of the country?

Q. Not in that section; but you did have over in Wallowa?

Mr. BENNETT: We object to that as incompetent, immaterial, irrelevant and not in anyway proper cross examination.

COURT: Where is that?

Mr. HENEY: That is over on the east side of the reserve; yes, it is a long distance away, your Honor.

COURT: Well cut it out.

Q. Did you have any in Crook County in connection with Boggs and Gesner?

Same objection.

Objection overruled.

Defendants except.

A. I am not certain. There might have been a section or two. There might have been some. I have forgotten where that land is, but I think there was some next the line.

858 Q. Boggs secured the application for those in Prineville, for you, in July, 1902, didn't he?

Mr. BENNETT: We object to that as immaterial, irrelevant and not having anything to do whatever with this case and not proper cross examination.

Objection overruled.

Defendants except.

A. No one ever secured any application for me.

Q. When you were in Prineville in June, 1902, you say you don't remember doing any business there except that of selling a piece of land, perhaps for Judge Webster?

A. That is all I can recollect. Yes, sir. I don't say that I didn't transact some other business but that is all I can find any data to bring to my recollection.

Q. Didn't you discuss with Dr. Gesner the advisability of securing section 16, township 15-19 school lands, at once, on account of Morrow & Keenan having secured those leases of those odd sections?

A. No, sir.
Q. You did not?
A. I say we might have discussed the advisability of getting that section of land but not to get ahead of Morrow and Keenan, or that there was any spite between Morrow & Keenan and us.
Q. Didn't you agree with Dr. Gesner that he could secure people to take up that section 16 and pay for the land out of the firm moneys, in June?

Objected to as being immaterial and tending to drag in other matters.

Q. In June while you were there—in June, 1902?

Objection overruled.
Defendants excepted.

859 A. I don't remember anything of the kind.
Q. Didn't you agree with him that you could furnish the money to pay for the northeast quarter of section 16 in 15 S. of range 19 E. for Mary A. Swearingen, and wasn't the money furnished, with your knowledge, on June 24th, 1902, $200, and isn't that the $200 that appears in this bank account of Williamson, Wakefield & Gesner of that date?

Mr. BENNETT: That is objected to as being immaterial, irrelevant and not proper cross examination, and tending to drag outside matters and collateral matters into the case.

A. I don't remember anything of the kind.

Objection overruled.
Defendants except.

A. The question was whether or not we had canvassed the matter when I was there?
Q. Yes.
A. I don't recall it. We may have done it. We might have talked of those matters. I don't say we didn't, but I don't recall it.
Q. Didn't you agree with Dr. Gesner that he could pay $50 to any applicant for 320 acres, $25 for each quarter, to secure that section 16?
A. I don't remember that.

Objected to as immaterial, irrelevant and tending to drag collateral matters into the case, and not proper cross examination.
Objection overruled.
Defendants except.

A. I don't remember of making any such agreement with Dr. Gesner.
Q. Wasn't section 16 deeded to you, conveyed to you?
A. To me?
Q. To you and Gesner; to your firm; half of it from his sister, Mrs. Gerowe and, *and* a quarter of it from Mrs. Swearingen,
860 a *a* widow who was living there in Prineville at the time? You know her, do you?

A. I know Mrs. Swearingen.
Q. She was a widow there in Prineville?
A. Yes.
Q. Were you boarding there with her?
A. What time do you speak of?
Q. In 1902. In June.

Objected to as immaterial.

A. Oh, I may have eaten down at her house.

Mr. BENNETT: Wait a minute. We object to that as immaterial, irrevelant and having nothing whatever to do with this case, and as not proper cross examination.

COURT: State the purpose of it.

Mr. HENEY: I propose to show, if your Honor please, this witness had denied knowledge of the fact that Dr. Gesner had made any arrangement to buy these lands. Now, as bearing upon that question, I propose to show that Dr. Gesner agreed to pay this women $50 if she would take up this school section, and assign it, at the time of making it up, to the firm of Williamson & Gesner, and that she entered into that agreement and that the $200 on June 24th was taken out of the firm money and paid, sent over to pay for these lands, and that these lands were immediately turned over to Williamson & Gesner; and then to show, by the testimony of this witness himself on the former trial that he said that they did own in 1902 this 16 in 15-19.

COURT: When was this conversation?

Mr. HENEY: In June 1902; when this defendant was up there in June, 1902. Just before he started down to The Dalles, and his wife filed on July 1st, and these filings up there were on June 30th.

861 COURT: Now make your objection, Judge.

Mr. BENNETT: The objection, may it please your Honor, is that the matter is irrevelant and immaterial and tends to bring in other and collateral matters and is an attempt to prejudice the defendants by other collateral matters, and is not proper cross-examination.

COURT: Did he admit being there at that time?

Mr. HENEY: Yes, he admits being there, and the testimony is that after having had the conversation with Wood on June 12th, he arrives in Prineville on June 15th; he is registered there on June 15th; and he admits being there and he was there from June 15th to June 25th, and this transaction is on June 24th. Then we propose to follow that by showing that on June 23rd, Dr. Gesner, out of the firm funds, sent the money to pay for the other 320 acres in that same section, stating in the letter that his sister, who was over in Washington, would send in the application as soon as it could get to her by mail, and go in.

Mr. BENNETT: I submit to your Honor that it is perfectly plain that the purpose of this is to drag in an outside and collateral matter, and put the defendants upon trial as to their honesty in that other matter and put it to them to explain what that other matter was,

and would make it necessary that we should stop the case at this stage to get the testimony which would be necessary to try out the right and wrong of this school land matter, and to get witnesses here to show what the truth about that matter was; a matter about which we have had no notice whatever that we were to be placed on trial, and to permit the matter to be dragged in here at this time at the close of the case, or at any time, as far as that goes but especially now at this stage of the case, would be the grossest injustice.

862 COURT: Of course the question is whether or not it is sufficiently relevant to the matter under examination to tend to disclose system; the fact that it may be an independent matter would not, of itself, justify its exclusion, if its tendency was to elucidate a system in respect to the acquisition of land by unlawful methods, even though they be state lands.

(Argument.)

COURT: I will take advantage of the noon hour to examine this testimony and reserve a ruling on that. You may proceed, Mr. Heney, with other matters.

Mr. HENEY: Very well.

Q. Mr. Williamson, in order to refresh your memory as to whether you attended to any other business while you were in Prineville in June that you stated, I will hand you two letters, one dated June 17th, 1902, and the other dated June 23, 1902.

Mr. BENNETT: We object to it as immaterial; I don't care very much about it. It don't seem to me it makes much difference whether he transacted any other business while he was up there or not.

Objection overruled.

Defendants except.

Q. I will hand you letter dated June 17th 1902. You wrote that letter on June 17th, in Prineville?

A. Yes, that is my handwriting.

Q. And mailed it?

A. Yes, that is my handwriting.

Q. There is a confusion in the date.

A. 1902, I think it is meant for.

Q. That other letter refers to it, doesn't it?

A. Yes.

Q. Refers to Chamberlain's reply to it?

A. Yes.

863 Q. Both of these letters were written by you while you were in Prineville in June, 1902 on a business matter?

A. It seems like it yes. I think you showed these to me before—the same letters, aren't they?

Q. Yes, they are the same letters.

A. In regard to some land out south of the town there.

Q. Out south of Prineville?

A. I think so; some land at Bear Creek Buttes.

Mr. HENEY: We will offer these two letters in evidence, but we

only offer them for the purpose of showing that he was attending to other business.

Objected to as immaterial and not proper cross examination.

COURT: They may be admitted for the purpose for which they were offered solely.

Defendants except.

Marked "Plaintiff's Exhibit 196" and "Plaintiff's Exhibit 197."

(PLAINTIFF'S EXHIBIT 196.)

"PRINEVILLE, OR., *June 17th*, 1902.

Hon. M. L. Chamberlain, Salem, Ore.

DEAR SIR: In the school land fund, there are two notes given about three years ago as partial payment on lieu land; one against I. N. Moore, and one against my wife, Mrs. S. V. Williamson. I would like to pay up the interest on those notes. Will you please forward the amount of interest to me here at Prineville. Please send me the description of the land, and oblige,

Yours truly, J. N. WILLIAMSON."

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(PLAINTIFF'S EXHIBIT 197.)

"PRINEVILLE, OR., *June* 23, 1902.

Hon. M. L. Chamberlain, Salem, Ore.

DEAR M. L.: Your favor of June 19th is at hand. Enclosed you will find my personal check on French & Co., The Dalles, for $63, the amt. int. on notes No. 7985 and 8016.

With sincere thanks for your kindly congratulations and wishing you every success, I remain,

Sincerely yours, J. N. WILLIAMSON."

Q. You take it that refers to the same note here, the interest?

A. I think so; yes, I think so.

Q. Before your wife filed, did you have any talk with her about her making a filing?

A. I think so; yes.

Q. Now in that talk did you discuss with her as to where she was to get the money to make final proof with?

A. No, I think not.

Q. Now, at any time before she made her final proof, or at that time, did you have any talk with her about where she was to get the money?

A. Oh, I think not. Those matters generally come and go; if one wants some money they could have what is on hand, and if there isn't any on hand, he does without.

Q. You just went over and got the money for her?

A. Yes.

Q. Took it over and paid it to the Land Office?

A. Yes, certainly.

Q. Were you present when she was making final proof?

A. Yes.

865 Q. That is your wife's signature, is it?

A. This is my wife's signature.

Q. And this one also?

A. Yes, that is my wife's signature.

Q. And that is her final proof, testimony of claimant?

A. I believe so.

Q. Now, did you hear her make this reply to this question:—"Where did you get the money with which to pay for this land, and how long have you had same in your actual possession?" A. "Borrowed it at French & Cole's bank; I gave them my personal note without endorsement or security and have not promised to give security hereafter."

A. Who was that made that answer?

Q. Your wife.

A. Was that there in which she made final proof?

Q. Yes.

A. Well, I think I was present when that was taken, but I don't remember that question.

Q. That is your signature on the final proof isn't it?

A. Yes, that is right.

Q. And this one?

A. Yes sir, that is my signature.

Q. Now, upon your final proof, did you make this answer to this question? "Where did you get the money with which to pay for this land, and how long have you had same in your actual possession? A. By gradual accumulation for some months past."

A. That is right; that is right. I remember that. Is that in a circular?

Q. No, that is in the final proof; that is the top part of the final proof.

A. Yes, I looked at that the other day.

866 Q. That was made before Biggs up there, December 9th, 1902?

A. I guess that is the answer I gave; some such answer as that.

Q. And on December 5th the firm had borrowed at the Prineville bank, $3000, with which to pay for these final proofs, hadn't it?

A. Well, isn't that—I can't ask you the question?

Q. Yes, you can ask anything you want.

A. Isn't that a correct answer to that question?

Q. Well I suppose it would be explained so that would——

A. Could it be answered any more nearly correct?

Q. I think it could; yes.

A. It seemed to me that that was a correct answer. It seems so yet.

Q. Well, there hadn't been any gradual accumulation for some months *passed*, had there?

A. For about thirty years.

Q. I say for some months *passed*. As a matter of fact the firm had no money on hand and borrowed December 5, $5000, and the

purpose of that was to pay the final proof upon claim- that had already been made on November 28th, and were waiting for the money and hadn't been forwarded to the Land Office until the money was obtained. Isn't that true?.

A. That is true. But how could we have secured a loan had we not accumulated something during the past?

Q. You couldn't have.

A. Wasn't it secured on what we had accumulated; wasn't it our property?

Q. Oh, yes; you had accumulated property; but in the *passed* few months you hadn't accumulated the money with which you made final proof?

A. I think so.

867 Q. The question is where did you get the money, not the property that you owned, but where did you get the money with which to pay for this land and how long have you had same in your actual possession. How long have you had that money in your actual possession.

A. Well, when it comes down to that, I don't know to-day which money it was; whether it was money that was obtained at French——

Q. It is Biggs' draft. No, you don't know now, but it is Biggs' draft, sent from Prineville, as shown by his letter, and as shown by testimony of Dr. Gesner, as to the check that was given Biggs to pay for yours and three or four others.

A. Anyhow, it was borrowed money, Mr. Heney; there is no question about that just at that time.

Q. You say that you didn't hear any such remark as that testified to by Henry Beard as having been made by Dr. Gesner that evening he came back from that survey; that evening when you remained at home on account of the lame arm—that that was a good deal better grazing land up there than he had thought it was; that there was a spring on it and that you musn't lose it?

A. Well, I can just remember this much of the report that was made when they came back to camp that evening; that that was better timber down in that section than it looked from the camp where we were located; that is about all I can remember what was said.

Q. Did you understand at that time that that was what they were looking for particularly—was timber?

A. Yes; they were surveying to find where the lines ran.

Q. Where the lines ran?

A. Yes.

Q. Yes, but I say did you understand that that was what they were looking for, was timber, the best timber?

A. Why, yes.

Q. That is all they were looking for?

868 A. Oh, taken together with grazing—and its value for grazing and other—principally.

Q. You understood that Dr. Gesner was loaning the money on these claims with the view of getting the grazing upon them, didn't you?

A. Yes sir.

Q. Then you understood that in looking for claimants, he had an eye out for the availability of the claims for grazing purposes for grass and water?

A. So they could be used in connection with other lands that we had in that country.

Q. Now, do you say that Dr. Gesner, when he got back, did not say to you that that was better grazing than he had thought it was?

A. I don't remember of his saying anything about the grazing.

Q. You won't swear that he didn't say it, will you, Mr. Williamson?

A. No, I won't. It might have been said.

Q. And you won't swear that he didn't say there was a spring on it?

A. No, I will not. I was not over there and I don't know what was found in that section; never have been over.

Q. Now, did you ever shear any sheep for Morrow & Keenan after 1901?

A. I don't know. I think that is the last year we sheared for them.

Q. And they never ran on Horse Heaven range prior to 1901?

A. When I speak of shearing for them, Mr. Heney, I mean they brought them to our shearing plant and had them sheared there.

Q. You let them use your plant?

A. Yes sir.

Q. They never ran on that Horse Heaven range until 1902, did they?

869 A. I don't think they did.

Q. After they commenced to run on there, you didn't let them use your shearing plant any more?

A. They were down in there quite frequently in 1901, that I heard of, but they didn't run there permanently, I don't think, until 1902.

Q. At the end of 1901, you were thinking of going out of business, weren't you, before you got Dr. Gesner to go in with you?

A. I think I was figuring on going out of the sheep business at that time. I sold out all except one bunch of sheep.

Q. And you told Keenan, didn't you, in 1901 before you got Dr. Gesner in with you, that you were going to get out, and that he could get in and get that range?

A. I remember along that time of being in the notion of quitting the business. Just the year I can't recall.

Q. And before he applied for that, you didn't tell him that you had changed your plans and wanted those sections yourself, did——

A. Oh, I don't know whether I did or not.

Q. Now, before the first trial, you made preparations for the trial, did you not?

A. Yes sir.

Q. And planned out with your attorneys what your defense would be?

A. Oh, they asked us all about our experience up there, yes.

Q. And you had a theory upon which you were going to defend the case?

A. Oh, I don't know that we had any further than—so far as I am concerned, I have never had any particular theory only that I was not guilty of any intentional violation of the law.

Q. Well, before you started in on the trial of the first case
870 wasn't your understanding, and a general understanding between you and Dr. Gesner and Biggs that you weren't up there in June?

A. Just so. That is, it wasn't a theory, but the first time my attention was called, or I was asked when I was up there and to name the times, was on the witness stand during the first trial. I hadn't had my attention called sharply to the number of times I had been there in 1902 until I was on the witness stand.

Q. But before the trial you had an understanding—you went over as to when you were up there?

A. Yes.

Q. And tried to get at it on the theory of the defense?

A. Ye and Doctor and I talked it over that I was up there in July, but this June trip had escaped both of our minds.

Q. You reached a conclusion that you couldn't have had an understanding with Dr. Gesner before the first filings because you were not up there before July?

A. Well, in talking it over, the doctor and I—well we got thinking it over and July was the first time we could place myself up there after the April trip. That is true.

Q. And how did you succeed in placing yourself up there in July?

A. By this surveying trip principally, and looking at these sheep.

Q. Didn't you have any data or memorandum to refer to or anything?

A. Oh, that was quite a trip; a person could remember that; go out surveying for four or five days, they would remember climbing over the mountains.

Q. How did you fix being up there in April?

A. That was just after the convention when we had a——

Q. Blow out?

A. Well, not a blow out.

871 Q. Well, a reception?

A. It was a kind of celebration.

Q. And you remembered it by that? Now then, how did you place the conversation which you had with Gray as to what trip it was on, J. H. Gray?

A. Well, I haven't placed that at all. I never have placed that time. I remember of that conversation; just what time it was, I have never placed.

Q. On the first trial, I want to direct your attention to your testimony in regard to Gaylord and Crain, and ask you if you didn't testify this way:

"Mr. Williamson, you heard the testimony of Mr. Duncan and Mr. Gaylord and Mr. Crain, about some conversation in Dr. Gesner's office, in which they say there was a newspaper read there by you or

Dr. Gesner; what do you say about this conversation? A. Well, I heard the testimony and so far as Mr. Crain is concerned, he may have been in our office his brother, his older brother was in our office quite frequently, and Mr. Crain may have been in our office when I was there, but to the best of my knowledge, I never saw Mr. Gaylord until he took the stand here the other day. Q. And how about Mr. Duncan? Do you remember having any such conversation or being in there when any such conversation took place, when Mr. Duncan was there? A. The first time I ever remember seeing Mr. Duncan was about two months ago; possibly three months ago. Q. Then if there was any such conversation of that kind took place, you don't remember it? A. No."

Do you remember so testifying?

A. Yes.

Q. "Do you remember reading any article in a newspaper to anyone in there? A. No, sir."

872 Do you remember that?

A. Yes.

Q. And then;

"Now, Mr. Williamson, where were you living during the summer and fall of 1902? A. In The Dalles. Q. You had your family there? A. Yes, sir. Q. Were you up at Prineville or up about the ranch during that spring or summer at any time? A. Yes, sir. I can't remember how many times specifically, but I was up at Prineville; I remember of being up there just after nominating convention. Q. Just after nominating convention? A. Here in Portland, yes. Q. That was the first time you were nominated for Congress? A. Yes, I remember being up there some time in July. Q. When was that nominating convention; you say you were there just after the nominating convention; when was that? A. I think it was in April. Q. You remember being there in April and again in July? A. Yes, sir, and again in late November or early December, I was there for a few days."

Do you remember so testifying?

A. Yes, sir.

Q. And then followed:

"Now who was managing the sheep business up there for the firm? Who was the firm in the first place, at that time? A. The firm consisted in Dr. Van Gesner, Mr. Wakefield and myself. Q. And what was the firm name? A. Williamson, Wakefield & Gesner.

873 Q. How long had Mr. Wakefield been in the firm—well I will put that this way—how long had he been interested in the sheep business with you—Mr. Wakefield—at that time? A. I think since 1889 or 1890, I can't place the exact year. Q. And how long had Dr. Gesner been in—I am asking you about Wakefield first. A. I mean '99 or 1900. Q. (Mr. HENEY:) Wakefield had been interested with you since 1899 or 1900? A. Yes, sir. Q. How long had Dr. Van Gesner been interested in the firm? When did Dr. Van Gesner become a member of the firm? A. Why, I think in 1901. Q. How long did Wakefield continue in the business after the summer of 1902? A. Well I wasn't out there but I think they made their

trade, perfected their trade, about the early spring of 1903. Q. And then Wakefield went out? A. Yes. Q. Since that time has been Williamson & Gesner? A. Yes, sir. Q. But to the spring of 1903 it was Williamson, Wakefield & Gesner? A. Yes, sir. Q. Now, you have heard the testimony of Dr. Van Gesner; when did you first learn that Dr. Gesner was locating people up there—the Duncans' and those people, do you remember? A. If my memory serves me right they have been located before. Q. Before you got up
874 there? A. Yes. Q. Now, how did you first learn about that?
A. Well, in conversation with Dr. Gesner, if I remember correctly he spoke to me about it; told me that he had located some people up there; was going to loan them some money to make final proof."

Q. Do you remember that testimony? so testifying?

A. Yes sir.

Q. Mr. Williamson, I will ask you, upon the first trial if you did not testify as follows: "Q. Now what lands were you surveying while you were up there? A. Well, we had some lands we were taking up around there; we had some lands in that township for some time—we wanted to know where they were; and we had some road lands leased; and we had made an application for some more road lands and we wanted to know where they lay; we also wanted to see, well, my timber claim; we wanted to survey it out and see exactly about it; and that was about all. We wanted to find out where the township line was. There was quite a dispute on between the sheep and cattlemen, and we were trying to establish the township line as the dead line, and we wanted to know where the line was—the eastern township line."

Do you remember that testimony being given?

A. Yes sir.

Q. Now, the land for which you had made application, were you referring to the sections of road land enumerated in Dr. Gesner's letter of May 21st?

A. Part of them; yes; part of those same lands; I think five sections.

Q. You don't remember which sections they were, do you?

A. No, I couldn't name them.

Q. Now, referring again to your testimony in regard to being up at Prineville, on cross examination, I will ask you if you
875 were not asked these questions and gave these answers: "Q. Mr. Williamson, don't you remember going up to Prineville in the middle of June, 1902, with Wakefield, or being there with Wakefield? A. I can't recall it; I might have gone up at that time, but I can't recall it; I might have done it. "—. You usually stopped at the Poindexter Hotel, didn't you? A. I did that summer, yes. Q. I will show you the register of the Poindexter Hotel, Sunday, June 15, 1903. A. May I look in July too, while you have got it? Q. Yes, certainly, here it is. A. That is not my handwrite; that looks like my handwrite."

You were pointing to your name when you said it was not, and to "Prineville" when you said it looked like your handwriting?

A. Yes.

Q. "Q. That is, the signature does not look like yours? A. No, sir, the signature is not my handwriting. Q. It is Mr. Wakefield's, isn't it? A. I really don't know. Q. Aren't you familiar with his handwriting? A. Not very. Q. While he was a partner, haven't you received a great many letters from him? A. Very few. He is a man that don't write much. Q. In your opinion, is that his signature just below yours? your name? A. Well, sir, I would hate to say. Q. What would be your best opinion? A. Oh, it might be his signature; I have seen his signature a few times; not many. Q. You think the word "Prineville" is your handwriting, opposite your name? A. That looks like my handwriting; but that that is not my signature." You were pointing to the "Prineville" when you said "That looks like my handwriting," and then pointing to the signature when you said "But that is not my signature?" "Q. Wouldn't you say that you were at that hotel June 15, 1902? A. How is that? Q. Would you not say, after examining that, that you were at that hotel on June 15, 1902? A. Well, sir, it is a debatable question. Q. You won't swear that you were not,
876 will you? A. No, I won't. Q. You don't recall having any conversation with Mr. Gesner and Mr. Wakefield in the middle of June, 1902, about the necessity of protecting your sheep range out there by acquiring lands? A. The chances are if I was out there the 15th of June, we had talk along those lines. Q. Do you remember having a talk with a cattleman in regard to their keeping you from running sheep there? You heard the testimony of Dr. Gesner, didn't you? A. Yes sir. I remember having a talk with a cattleman. Q. Who was the man? A. Do you really want to know? Q. Yes, of course I do. A. Mr. J. H. Gray."

Do you remember that testimony?

A. Yes sir.

Q. Now, do you remember this testimony on the first trial? "Q. Do you remember how your wife came to file on a timber claim? A. Not exactly. Q. It was at your suggestion, I suppose? A. Well, I suppose—we talk things over pretty generally, my wife and I—and I presume it was a mutual agreement that she should take up a timber claim. Q. That was for the same purpose that you were taking yours, that is, in part at least, so that you would protect the property up there, wasn't it? A. My wife's timber claim, if you will notice the plat, is on a different slope entirely from any of these other claims, down on another creek—another township; an entirely separate matter. Q. It is in the adjoining township to 15 on the west; it is in 18? A. I think so, yes; yes. Q. Now, at the time your wife's claim was taken up you had under lease the adjoining section, which would be 15, in township 15, south of range 18 east, did you not? A. Is this east? Q. Yes that is east? A. I think so. Q. And you also had the section— A. No, that is 15 east of her place. Q. Yes, and just west of the sheep shearing plant. A. I don't think we did. Q. Just west of the sheep shearing plant;
877 let us see that lease; you leased that in 1900? A. Yes, we had that section."

Do you remember that testimony?

A. Yes sir.

Q. Well, now, that is on the same slope? Your wife's claim is on the same slope; or rather, the sheep shearing plant is about the summit, is it not?

A. Yes.

Q. And the country slopes off to the south and to the west and to the east?

A. Yes; I would say to the north and the south—the ridge running along to the west; there isn't much of a slope; the water shed is on the north side and the south side of the ridge.

Q. Yes, runs along about level from the shearing plant until it strikes Veazie creek?

A. Yes.

Q. And then starts to come down hill?

A. Well, till it strikes the head of another creek up there. Veazie Creek heads right at the shearing plant, or a few hundred yards from it.

Q. So it is gradually down hill from the shearing plant down that way?

A. Yes.

Q. Now at that time you had this section and this section under lease?

A. Yes.

Q. And weren't you using these two sections here?

A. Are those even sections?

Q. 25 and 26. One is odd and the other is even. That is in 18.

A. Well, I don't think we were using those sections much. Possibly the right hand section—26?—I cannot see from here.

Q. Didn't you have a fence along here on the west side of Horse Heaven at one time?

878 A. No, another man had that fence—had an- has yet; has 13 and 23 fenced. We use it occasionally; we haven't that fenced.

Q. Wasn't there a fence running along here on 26 at one time, or on 27 so that it shut in 26?

A. Will you bring it a little closer to me, Mr. Heney?

Q. Yes certainly.

A. I think that Mr. Benino's fence runs through possibly through these sections. Mr. Benino is our neighbor, who lives over here somewhere, and he has this fenced in here; I think his fence runs down here somewhere. We have a fence that joins onto him, and runs down through this country.

Q. So between the two fences at that time, you practically had this range on that side shut off from anything from over this side all the way down here, didn't you?

A. I will say this; that between Mr. Benino and ourselves, between this gentleman who lives here and ourselves, we did the principal grazing of this country in here, yes; grazed it for the principal part ourselves.

Q. And these sections in here—the "Shorty" Davis—doesn't this constitute the "Shorty" Davis pasture: 32 and 33 of 15-19, and 4 and 5, possibly 6, of 16-19?

A. Mr. Gray joins us on the north here and I might say he has this section and this section leased, and his fence runs over in here some where and down in here.

Q. Well, in 1902, you had 3 and 11 yourself?

A. Yes. I turned them over to Mr. Gray when he bought this place of Judge Bennett, at the mouth of Horse Heaven.

Q. He bought a place of Judge Bennett at the mouth of Horse Heaven, which is down here?

A. Yes.

879 Q. Now then, he had this country fenced here, didn't he, so that he took in 6, 7, 9 and 10, and then you turned over these two to him so that he had all that country, and there is a fence that ran down here and practically fenced that off?

A. Well, Judge Bennett didn't have any fence, except his farm down here.

Q. I am talking about what Gray had.

A. This has been all fenced since Gray bought it.

Q. Gray connected this so he had that country fenced?

A. Yes.

Q. Now then, that left all this up here for you folks?

A. Yes. I can't say just where Gray's fence runs through here; I don't recall the sections; but it is through that country somewhere, and it is a partition fence between he and us.

Q. North of that partition fence was the "Shorty" Davis pasture wasn't it?

A. Right in here, covering this country in here. It isn't only two miles and a half through there—from here, I think, across to there, the widest place; runs down in a "V" shape.

Q. "Shorty Davis" disappeared?

A. Yes.

Q. He was running sheep?

A. Yes sir.

Q. What year was it he disappeared in?

A. That was five years ago last August.

Q. And you bought his sheep at the administrator's sale?

A. No, sir. Dr. Gesner bought his sheep, and I bought this pasture. We didn't kill the man though.

Q. Oh, no, I am not intimating that; not intending to. And you have used the pasture since?

A. Yes.

Q. And you were using it in 1902?

A. Yes sir.

880 Q. So if Davis was killed by cattle men, why, they haven't bothered you any for taking the same place and running it?

A. Oh, no; Oh, no.

Q. Well, the claim of your wife was taken up partly to protect that range, wasn't it?

A. Partly for range purposes.

Q. Now in 1902, didn't you own three-fourths of section 16, in township 15-19?

A. I don't think we did.

Q. On the first trial, in answer to the question, "Didn't you own about three quarters of 16 and he the other quarter?" didn't you make the answer "I don't know whether he owned the other quarter; I have understood that he did. We owned three quarters of that section"? (referring to Barnes).

A. Well, I don't know just the year—it was along in there somewhere—that we bought the remaining part of that section. I can't just state the year; it might have been 1903. I don't recall that.

Q. But you do own three quarters of section 16?

A. I think so, yes.

Q. And that is the 320 acres that was obtained originaliy in the name of Dr. Gesner's sister?

A. Yes sir.

Q. And 160 that was secured in the name of Mary Swearingen?

A. I presume so. I really don't know about that.

Q. Well, you haven't purchased the quarter that Barnes had?

A. No.

Q. Or the Monroe Land Co.?

A. No, no; there is some one else who owns a quarter of that section, some one here in Portland.

Q. I will call your attention to this testimony on the first trial: "Q. Now, at the time that your wife took up that section, weren't you thinking of taking up one also in there? A. I was
881 thinking about it, yes. Q. You had talked it over with Gesner a good deal also? A. I am not so certain about that. If I was up there in June, I may have, but I don't recall being up there in June. There is something mysterious about that signature in that book. Q. Isn't anything mysterious about the word 'Prineville' being in your hand writing, is there? A. It might be my writing. Q. If you go and stop at a hotel with a man don't you frequently sign his name as well as your own if you get up to the book first? A. I think if I had an opportunity I could place myself exactly when that signature was made in Prineville. Q. Haven't you had plenty of time? A. I didn't know you had that kind of a signature. Q. I asked that question of Gesner, whether you hadn't been in Prineville, when he was on the stand the other day, on June 15th. Now, then, didn't you, as a matter of fact, talk it over with Gesner before your wife filed, and come to an understanding that if you could secure the control of some lands up there in 15-19 and 15-18, in addition to those you had leased, you would do so? A. You are speaking of my wife's claim? Q. Yes, before your wife filed? A. I don't think I talked the matter over with Gesner, unless I was up there in June, which I can't recall; I had no opportunity to talk it over with him except the days I was there after the convention. Q. Now, then, in having your wife file, do you remember the circumtsances as to how she came to file and when she filed? A. Well, in talking matters over I suppose she and I concluded that she had better take up a timber claim; that is the way we generally do business; and she knows—she was well acquainted with this particular 160 and was not so well acquainted with the

other localities in there; she is particularly well acquainted with this 160."

Do you remember that testimony?

A. Yes sir.

Q. That is correct?

A. Yes, that is correct.

882 Q. In your wife's final proof, in answer to the question, "What is the estimated market value of the timber standing upon this land?" she says, "$500.00." Can you recall as to whether you talked that over with her about the amount?

A. I am inclined to think we talked that over, yes.

Q. I will call your attention to this testimony on the first trial: "Q. You heard Dr. Gesner's testimony about the purpose of this land being taken up there. Now, what was your understanding about that, about locating these people and loaning them money on the lands, whether or not it was with any reference to use for grass, and to your other holdings?" (This question by Mr. Bennett). "A. Well, I heard the doctor's testimony. The understanding that I got when I was up there was a little different from what he had it. I thought the claims were being located from what he had it. I thought the claims were being located that he was going to loan money on, near to some of the lands that we had or had applied for so that they could be used in connection with them for grazing purposes, as well as the timber. That is the understanding I had of it."

Do you recall that testimony?

A. Yes.

Q. And that is correct, is it?

A. That is correct.

Redirect examination.

Q. Mr. Williamson, when was it first called to your attention—when did you first learn the date of the Wilford Crain check? Did you know that at the last trial?

A. No.

Q. Did you know that one of those checks was dated the 9th and the other the 11th at the last trial?

A. No. I didn't know anything about the checks.

Q. Do you know how that was discovered, and when it was discovered?

A. Why, Dr. Gesner called my attention to it when I went out, just a few days before this trial—when I went out to Prine-
883 ville; I was out there three or four days.

Q. Now, about the Starr matter—the conversation that you had with Ernest Starr after he had testified at the first trial. Where did that occur, Mr. Williamson?

A. After he had testified he came down to my room, down at the Imperial Hotel, he and his brother.

Q. Did he come about your room, or about you, before he testified?

A. No, I never saw him before he testified.

Q. When he was here at the second trial, did he come about you before he testified?

A. No, sir.

Q. Did you see him at all to talk with him before he testified at either of the trials?

A. No sir. I think that this talk that he and I had was between the two first trials.

Q. Well, I know, but at the time of the trial, after he came here to testify at either trial?

A. No, sir.

Q. And before he testified?

A. No, sir.

Q. This talk that you had as I understand was after the first trial?

A. That is it.

—. And he had testified?

A. Yes sir.

Q. And do you know what the state of the case was at that time?

A. I think the jury was out, I am not certain.

Q. The jury was still out? They hadn't agreed yet?

A. I think so.

Q. And do you know whether he had been discharged by the District Attorney; whether Ernest Starr had been discharged by
884 the District Attorney at the time you had the talk, as a witness?

A. I really don't.

Q. You don't know about that? Well, now, counsel has asked you about that and about his statement that you called him a liar. Now just state what did take place up there in that talk?

A. Why, he and his brother came up, and I had two rooms, and we sat down in one of them and soon the subject was brought up about the trial, and I directed my conversation principally to his brother, partly to himself. I remember turning to him and saying, "Ernest, according to your testimony, you seemed to have an agreement or contract with Dr. Gesner, something of that kind." Well, I said, is it possible, or did you have such an agreement with him or any such an arrangement with him that if I had come along and offered you $1000 for that land, you couldn't have taken it." He says, "Why, no, I didn't have any such an agreement; I would have taken a $1000, of course." Well, then, I said, "Why didn't you testify that way," and in not an exactly angry way, but rather an earnest way, I said to him that there was no use of telling a lie to conceal the truth, that is the way I phrased it, and in closing up the conversation, I said, "Now Colonel," I always called him Colonel—"Ernest, we will not have any falling out about this at all; I am inclined to take a charitable view of it, and think that you are mistaken," and I think that is about all of our conversation.

Q. Do you remember whether anything was said about the matter of his buying into the firm, whether he expected to buy into the firm?

A. Oh, yes, I said, "You testified that you never had been—you

had never discussed the matter of buying into the firm," and I cited him two or three times that I could recall when I had talked the matter over with him. Well, he said that he was so frightened when he was on the stand that he didn't know what he was testifying to. He said, "I remember those instances that you suggest."

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Q. Well, now, did the matter come up, do you remember whether you said anything about whether you wanted him to go to work for you or not?

A. Well, yes, that was afterward. He came in in a day or two to get some money. He said that he hadn't received his fees for some reason and wanted some money, and drew a few dollars—sixty or seventy dollars, and the question came up whether or not we wanted him to work for us any longer. Why, I says, as a matter of course——

Q. Well, you needn't mind about that if that was a subsequent conversation, if you think it was a subsequent conversation. Now, about the quality of the grass, what kind of grass is on that timber land up there—just tell the jury about the grass up there?

A. It is a scattering quality of grass, it isn't a solid bunch *bunch* grass; not a solid coat of grass—it has a coat of weeds, and an occasional bunch of grass, and an occasional bunch of blue grass.

Q. Blue grass, you say?

A. Now, we call it blue grass, mountain-like grass, a blue bunch grass. Not what these gentlemen would understand by blue grass. It is what we call a blue bunch grass, about that high. And then there is a sour grass or pine grass that grows—it isn't very good. It doesn't last as a range going over it a few times it is done for, for that season.

Q. Now, how much of the year can this ground be pastured, practically?

A. Well, you cannot run in there over four months in the year.

Q. Mr. Williamson, what would be at that time, in 1902, the fair value of that land for pasturage purposes alone?

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A. Well, sir, I have never been able to figure over a dollar an acre out of it, real worth for pasturage.

Q. Which was it most valuable for, for timber or for grazing purposes?

A. Well, I would think it was much more valuable for timber.

Q. Now, in these letters that have been called to your attention which were written in 1902, some reference is made to notes which have been executed to the school land board, I take it, three years before?

A. How is that?

Q. Some reference is made to a note being three years old in those letters that you wrote from Prineville in June, 1902?

A. Oh, that is an entirely different matter—that is some land out at Bear Creek Buttes, that was bought eight or ten years ago by my wife and I.

Q. Eight or ten years ago?

A. Yes, sir; south of Prineville.

Q. Now, Mr. Williamson, Mr. Heney showed you a paper here and told you it was part of your wife's final proof, and asked you about whether you were present. Examine the paper and see whether you were present—see what it is in the first place?

A. I misunderstood Mr. Heney about this. This is the cross examination before Mr. Bennett.

Mr. HENEY: Cross examination before Mr. Bennett?

A. Yes.

Mr. HENEY: It is part of the final proof.

A. Well, you see the final proof is taken by the register, and then the special agent takes the applicant in a room by himself and gives him a cross examination, and no one else is admitted to the room.

Q. Well, now, were you present at the time that that papers was made, or that that answer that Mr. Heney called your attention to about how your wife got the money, was made?

887 A. No, sir; I wasn't present.

Q. Do you know anything about whether she made that answer or not, or how it came that she did make it, if she did?

A. I really do not. I suppose if she made that answer—she must have made that answer, something of the kind—she must have said to him that we borrowed the money of French's and he has put it down in the singular number that "I borrowed" the money at French's.

Q. You don't know anything about that? All you know is, that her signature is at the bottom?

A. That is all.

Q. Whether she made that answer or not, you don't know anything about it?

A. No, sir, I don't know anything about it at all.

Mr. BENNETT: We ask that that be stricken out.

Q. You were present at the time that final proof was made?

A. Yes, sir.

COURT: Were those examinations made before the special agent had upon the same day as making the final proof?

Mr. BENNETT: Yes, your Honor, on the same day, but separate and apart and Mr. Williamson wasn't present.

COURT: Are they invariably made under the practice of the Interior Department now with respect to timber and stone entries?

Mr. HENEY: Yes.

Mr. WILSON: I think the practice was, if the agent was there he examined the same day, if he didn't happen to be present—this was at the Land Office—then the cross examination could be conducted at his convenience; but if he happened to be present the same day, it was taken then.

Mr. HENEY: They used to have the cross examination taken by the United States Commissioner where the proof was taken

888 away from the land office as part of the final proof. Then they stopped that and located a special agent at each land office who, if present when the proof was taken—and he would have notice and try to be present at most of them—would cross examine

the applicant then and there; but if he wasn't present, then the special agent would send for the party to cross examine later on. This particular one of Mrs. Williamson, the cross examination took place at the same time as the final proof. That is, your wife went off into another room with him while you were still there in the office and that cross examination took place, is that correct?

A. I believe that is correct. * * * You will find a second cross examination in this proof, too.

COURT: I think that ought to go out. The motion to strike out will be sustained.

Mr. BENNETT: We ask at this time to have the cross examination in relation to that matter of Mrs. Williamson stricken out, your Honor. The paper itself.

Mr. HENEY: The paper wasn't offered. I didn't offer all the papers.

Q. Now, Mr. Williamson, I wish you would tell the jury whether you ever conspired or agreed with Dr. Gesner or with Mr. Biggs or with either of them, to get the persons named in the indictment or any person to commit perjury?

A. I certainly did not.

Q. Did you conspire or agree with Dr. Gesner or with Mr. Biggs or anyone to get them to swear to anything that was not true?

A. I certainly did not.

Q. Did you have any intention of doing anything of that kind or having them do anything of that kind?

A. No, sir; no, sir.

889 Recross:

Q. Mr. Williamson, you say this land was only worth, in your opinion, about a dollar an acre for pasturage purposes outside of what it was worth for timber?

A. Well, generally, yes. You see there is so much difference; some of those lands are really good for pasture purposes and others of them are almost worthless except just one passing over them, about.

Q. It was not worth for immediate use, much for timber, either, was it?

A. Well, I would like to have a deed to my own part pretty well. I would take chances on getting a market for the timber right now if I had the deed.

Q. Did you know of any market there in 1902?

A. Well, I think the market was better in 1902 than it has ever been since, because there was quite an excitement in there about timber along about that year.

Q. Didn't you know at the time those claims were being taken up in July that a forest reserve was being considered and that a report was expected just about that time to be made with the probability that those lands might be put in that forest reserve.

Mr. BENNETT: I will interpose an objection that that is immaterial, incompetent, irrelevant, and not proper cross examination.

Objection overruled.

A. No sir.
Q. You did not know?
A. No sir.
Q. When was it you first knew that the forest reserve, withdrawal which was made on July 28, 1902, was about to be made?

Same objection and assuming that a forest reserve was made.
890 Objection overruled.
Defendants except.
Defendants except.
COURT: I suppose, as a matter of law, the Court perhaps would take judicial notice of the forest reserve.
Mr. HENEY: Yes, public proclamation of the President.

A. The first information ever I had of that withdrawal I read in the Oregonian.
Q. On what date?
A. I can't say the date.
Q. Was it after the withdrawal?

Mr. BENNETT: This all goes in subject to our objection.

A. It was just about the time it was withdrawn.
Q. Well, it was after the proclamation of July 28th then?
A. Oh, no; no; just immediately the news came out.

Mr. BENNETT: July 28, of what year?
Mr. HENEY: July 28, 1902.

A. I think the Oregonian correspondent at Washington got the news there from some of the Departments and it was telegraphed here just a short time, just a few days prior to withdrawal. That was my first information on that subject.
Q. Isn't that impression based upon the fact that a few parties secured all the school-lands within the reserve that was withdrawn, known as the Ormsby part of it, just a day or two before July 28; that is, July 26.

Mr. BENNETT: We object to that as being immaterial, irrelevant, and not part of the cross-examination.
COURT: State your purpose, Mr. Heney.
Mr. HENEY: The witness has stated that these lands were worth only a dollar an acre for grazing purposes and he has tried to create the impression, or at least the testimony is certainly for the purpose of basing an argument to the jury that in taking up these lands they weren't taking them up for grazing purposes and that they
891 weren't worth the amount of the money that was being loaned upon them except for the timber. Now, I think if I can show that the defendant knew, or had reason to believe that they would probably be turned into a forest reserve and if they were not put in that he, as a just elected Congressman, could succeed probably in getting them in thereafter and thereby make them worth as they would be $5 to $5.50 an acre immediately in the market; that that has some bearing upon the probability of their having had

these men take them up and loaning $400 on them, when they were only worth a dollar an acre for grazing purposes which was the purpose they wanted them for.

Mr. BENNETT: I submit to your Honor that that is far fetched.

COURT: I think that that is too remote. But upon the other question that I had under advisement at noon I think that testimony is admissible if the District Attorney desires to proceed—the time being about June, 1902.

Mr. HENEY: June 24 one of them, the other June 23.

Q. Then, Mr. Williamson, on June 24 I call your attention to the entry on the debit side of Williamson, Wakefield & Gesner's account of the First National Bank of Prineville, Oregon, and entry of June 24, 1902, $200; and I call your attention to a certified copy of a letter by J. J. Smith, County Clerk at Prineville to M. L. Chamberlain, Clerk of the State Land Board, inclosing an application to purchase State land of Mary A. Swearingen and a draft of $200 in full payment for the same. Now, with those two things to refresh your memory, didn't you have a talk with Dr. Gesner prior to June 24 and in June, while you were up there on that trip, in which it was agreed that he could use the firm money and secure somebody to apply for section 16, township 15-19 from the State for school-land and pay a consideration to the person for filing upon it?

892 Mr. BENNETT: Now your Honor, we object to that as immaterial and irrelevant and not proper cross-examination except of a defendant on the witness stand and as being, if admissible at all, a part of the Government's direct case.

COURT: I will overrule that. I think it is competent as bearing upon the question of knowledge and pre-existing design system, or scheme. The jury will understand though and it is proper at this time to admonish them, the rule of law is that no matter how guilty a man might be proven on an offense not the one under investigation, he could not be convicted except of the one under investigation. Its only relevancy is as bearing or tending to bear upon the question of knowledge, intent or pre-existing design or scheme.

Mr. BENNETT: And we except to your Honor's statement to the jury in which there seems to be an application that these papers and this examination show or tend to show that the defendant is guilty of some other crime.

COURT: Well, Judge, I don't mean that. I desire the jury to understand—I mean to carry no intimation of any kind, character or description. I am passing upon the legal admissability of the testimony. I am doing it in order that the rights of the defendant may be guarded under the rules of law.

Q. Now you may answer the question.

A. I don't remember anything about that transaction in general. There might have been something said about it but I don't recall it.

Q. I call your attention to a certified copy of a letter from Dr. Gesner to M. L. Chamberlain, Salem, Oregon, of date June 23, 1902, inclosing a check for $80 for payment on the west half of section——

Mr. BENNETT: We object to the reading of these statements.

893 Mr. HENEY: Well, I will let you read that letter. (Hands letter to witness.)

A. I never saw the letter before.

Q. Do you remember having any conversation with Dr. Gesner in June, 1902, in relation to his having his sister, Mrs. S. M. Jerowe take up a portion of that section 16 in township 15-19 for the firm?

Mr. BENNETT: This matter all goes in subject to our objection, without interposing it every time.

COURT: I understand all this examination under this ruling goes in against your objection for reasons already stated, and the objection is overruled and exception goes to the admission.

A. I don't remember anything of the kind having occured when we were there in June, when I was there in June.

Q. During the first and second trials and a part of this trial Chester Starr was in town—at court and in town here?

A. Yes, sir.

Q. He is a brother of Ernest Starr?

A. Yes, sir.

Q. He is your foreman?

A. Well, yes, sir; he is in that capacity now.

Q. Has been since 1902?

A. Well, I think during the past two years he has been. Ernest Starr was really superintending the sheep there for a year; in the year 1903 Ernest Starr was really the foreman.

Q. And in 1902 Chester Starr was the foreman?

A. No; no; I think Wakefield was in partnership with us that year.

Q. And Chester Starr was working for you?

A. Yes.

Q. And he has been working for you ever since?

A. Yes.

894 Q. And Chester Starr and Ernest Starr have a father and a mother living here in town?

A. Yes.

Q. And they were both stopping at her house or at their father's house?

A. Part of the time I think.

Q. And you saw the father frequently during the first and second trials?

A. Oh, I haven't seen him but two or three times. I saw him down here two or three times.

Q. You have seen Chester frequently during the first and second trials?

A. Quite frequently, yes, sir.

Q. And between times?

A. Quite frequently; yes sir.

Surrebuttal.

J. N. WILLIAMSON, recalled on part of the defendants, testified:

Direct examination.

By Mr. BENNETT:

Q. Mr. Williamson about how far is it from your sheep shearing plant by the road to Prineville?

A. We call it eighteen miles.

Q. How far is it from your wife's timber claim to Prineville?

A. It is about fifteen, if I remember correctly.

Q. Do you know whether the mill known as the Demaris mill on Mill Creek was being operated last year or this year?

A. The Demaris mill spoken of this morning?

Q. Yes, the one spoken of on Mill Creek?

A. Oh, that mill was burned a year and a half ago.

Q. You heard the testimony of Mr. Gray in relation to section 35, in which he claimed that you had made an arrangement by which you would let him have it, or had agreed to let him have section 35. What was the arrangement about that, if anything about
895 section 35 at the time you let him have those other two sections?

A. Well, as near as I can recall it, when he bought the place of yourself, which I had leased at the time, he wanted to know how many of those sections of road land I had leased in connection with your place, that I was willing to give up or could give up in connection with your place.

Q. Without going into too much detail, state what the arrangement was about section 35, about your letting him have section 35?

A. I told him he should have a portion of that place whenever I went out of the sheep business.

Q. Did you agree to let him have it the next spring?

A. No, sir.

Q. You have just heard the testimony of Mr. Keenan who was on the stand?

A. Yes, sir.

Q. State to the jury that conversation with Mr. Keenan as you remember it. What was the first conversation you had after the sheep were killed, and how did it come up?

A. The first time I remember of seeing Mr. Keenan after his sheep were killed, I met him on the street. Conversation naturally reverted to the killing of his sheep; it was only a few days after his sheep were killed. I think he had been up there looking after the matter and was returning home through Prineville. In that conversation Mr. Keenan said to me that he would not take his sheep in that country any more to summer, but he would try and get his ranges in the Cascade Mountains for them. Some time afterward he was over at Prineville and in talking in our office there, just walked into the office, the conversation came up the same way. I said, "If you are going to make that movement, I have a range over

in there, and if your sheep are taken out from here up near
896 me there, I won't need my range over in the Cascade mountains and it will revert back to the government, and you have a chance to get it. We had no range in the Cascade Mountains except by application and allotment under the Forest Reserve system.

Cross-examination.

By Mr. HENEY:

Q. At the time you made this arrangement, when Gray bought Mr. Bennett's place, did you then expect to go out of business the next year?

A. Well, I was figuring on it, yes.

Q. You told that to Gray, didn't you?

A. Well, not exactly the next year, but I was figuring on it. I didn't have any time set. I was figuring on the way things were going, that I would go out of the sheep business in some future time.

Q. Did you not at that time expect to go out the next year?

A. Well, that was in the calculation, yes.

Q. And you indicated that to Gray, in the talk?

A. Yes, sir, I told him I might go out the next year.

Excused.

The defendants rest.

897 During the trial of said cause, one P. L. Branton, was sworn on the part of the defendants and testified in substance, that he was present at a conversation between Dr. Gesner, Campbell, Duncan, Frank Ray and Green Beard, who were among the applicants for timber land introduced as witnesses for the government. The testimony of these witnesses had tended to show that there was at that time some agreement between Dr. Gesner and them, that they were to transfer the land to him after they had acquired title.

The witness Branton testified in substance that he heard the conversation, and among other things that Beard asked Dr. Gesner whether he would buy the timber claims and that Dr. Gesner stated to him (Beard) that he could not buy them, that he could not make a contract at all, and that Beard could not sell them and went ahead and gave his reasons for it among which was that he had legal advice on the matter, and was told that he could not make any contract at all. The witness was a material witness for the defendant.

And thereupon, upon cross examination, the witness testified that he was going to Eastern Oregon from Lane County at the time when he met Campbell Duncan and went up with him to the shearing plant where they met Dr. Gesner. Whereupon the following questions were asked him on said cross examination: "Q. I thought you were on your way to Idaho, wasn't you?" A. When I met Campbell Duncan? Q. Yes. A. No sir, I was not. Q. Did you say you were? A. I did not. Q. You didn't tell him that? A. I did not. Q. Didn't tell anybody that? A. I did not. Q. How did you come to go to Campbell Duncan's house? A. I was on my way to Vale,

Oregon, in the eastern part of the State. I had a younger brother there by the name of Fred, and he wanted me to come out to where he had located, and I had started at that time, thought I would go up there, and I came along where Campbell was living.

898 And thereafter upon cross examination said witness was asked the following questions: Q. "After you got back to Sisters and took up the homestead you went into Prineville, didn't you? A. Why, I have been into Prineville several times in the last two years and a half. Q. About one year after you had been up to the timber and in Prineville, didn't you have a conversation with Frank Ray, and didn't you tell him that the reason you did not take a timber claim at that time was because there wasn't enough in it? A. I don't *don't* remember having any conversation with Frank Ray at all regarding the timber. Q. You will swear you did not say that to him? A. I am positive that I never met Frank Ray to my knowledge except once from the time that we were up there to the timber until since I came here to Portland at this trial. Q. When was that once? A. I met him on the road east and north of Prineville. I don't remember the name of the stream he was on, but I was going up to look after some horses I had, and I met Frank Ray, if I remember right and I might possibly — mistaken in meeting him there; it might have been some one else. Q. When was that? A. That would have been in May or June, 1903. Q. Did you tell him on that occasion at that place that the reason you did not take a timber claim, referring to the time you went up there, when Dr. Gesner was there, was because there wasn't enough in it for you? A. No, sir, I did not. Q. Or that in substance? A. No, sir. Q. Did you have a talk with Campbell Duncan in Prineville, in 1903, about a year after you had been up there, in which you told him the reason you did not take a claim there was because there wasn't enough in it? A. I have met Campbell Duncan a number of times, but whether I met him in Prineville, I would not be positive since the time in 1902 that we were up above. Q. Did you tell him that on any of those occasions? A. I don't remember having told him that in substance.

The following is all of the testimony of the aforesaid witness P. L. Branton introduced at the trial.

899 P. L. BRANTON, sworn on part of defendants, testified:

Direct examination.

By Mr. WILSON:

Q. Where do you reside?
A. At Sisters, Crook County, Oregon.
Q. Do you remember going up into the timber with Campbell Duncan and perhaps some others in June, 1902?
A. Yes, sir.
Q. On that trip you state to the jury whether or not you saw Dr. Gesner, one of the defendants.

A. Yes, sir, I did; at a claim they call the Williamson shearing plant on that trip.

Q. Did you hear any talk between Dr. Gesner and the people there relative to the timber claims?

A. I did.

Q. You may state who was present, as far as you now recall when he made that talk.

A. There were five I think, or possibly six men present; to be positive to the number I would not, I would not swear to that. There was Campbell Duncan and a man by the name of Ray, I don't know his name except Ray and I think two other men. I would not be positive as to two, but one other in particular who said his name was Beard. He was a man I would not know if I met him again, I have entirely forgot his looks but that was the number. There might possibly have been six, but at any rate five. Do you want me to state the conversation?

Q. Yes. You may state the conversation as far as you remember it occurring between them referring to timber claims.

A. Well, as regards to the exact matter that was brought up, I would not be positive to the words used, but at any rate this man who claims the man I think they call Dr. Gesner called him Beard if I remember right——

900 Q. You think what?

A. I think the Doctor called him Beard; this man asked Dr. Gesner what about these claims; will you buy them, these timber claims? Dr. Gesner stated to him that he could not buy them, he could not make a contract at all, and further, he said, "You can't sell them," and went ahead to give his reasons for it.

Q. What reason did he give?

A. He said that he had legal advice on the matter and that he was told that he could not make any contract at all.

Q. Was there anything said as to what these timber claims would be worth?

A. Why the Doctor did say finally, that after they got their patents if they wanted to sell them they would be worth at least $500 to him.

Q. Did you hear him say anything about a mortgage?

A. Why, yes, sir.

Q. What was said about the mortgage?

A. About the mortgage?

A. Yes, if anything.

A. Why the Doctor said he would loan them the money to prove up on the timber claims and would take their notes and take a mortgage to secure him.

Q. Was anything said as to how long the mortgage was to run?

A. There was to be no definite period was my understanding; that it did not make any difference to the Doctor how long they ran, was my understanding of the matter.

Q. Was anything said about the rate of interest and how the interest was to be paid?

A. He said he would charge no interest provided he got the use of the grass.

Q. Did he state for what purpose? What was his language
901 relative to the use of the land?

A. Well, I don't exactly understand your question, Mr. Wilson.

Q. Was there anything said so that you knew how the interest was to be paid?

A. Yes, he said that he wanted to use it for grazing purposes.

Q. For grazing purposes?

A. Yes, sir.

Q. The use to pay for the interest? For the grazing purposes?

A. That was my understanding of it.

Q. Was anything said in your hearing to the effect that the Doctor was to furnish the money to prove up on, and after getting the title to pay the balance?

A. No, sir, I don't remember anything.

Q. Did you hear him ask anybody if they were satisfied with such a proposition and did they assent or dissent?

A. I did not.

Cross-examination.

By Mr. HENEY:

Q. How long have you lived in Oregon?

A. I was raised in Oregon.

Q. In what County?

A. In Lane County.

Q. What is your father's name?

A. Samuel D. Brandon.

Q. What became of him?

A. I don't know. He has disappeared; he was evidently drowned.

Q. Who was the last man with him?

A. I was to my certain knowledge, so far as I know.

Q. Any brothers?

A. Have I any brothers?

Q. Yes.

A. Yes.

902 Q. What are their names?

A. Roy and Fred.

Q. Any half brothers?

A. No, sir.

Q. Did you ever have any half brothers?

A. No, sir.

Q. Who is Claude Brandon, any relative of yours?

A. He was a brother of mine.

Q. What did you mean by saying that you didn't have any?

A. I mean that I haven't at the present time.

Q. Where is he?

Mr. BENNETT: That is objected to as immaterial and incompetent.

The COURT: I don't see the purpose of that.

Mr. HENEY:

Q. I am trying to go into the history of this man and find out how a credible a witness he is.

Objected to same.

Q. Where were you in 1898?
A. I couldn't say as to that.
Q. Were you with Claude Brandon in any part of the year 1898?
A. Why, I couldn't swear as to the date at all. Whether I was or not, but I presume I was, but I wouldn't be positive that I was.
Q. Were you traveling across the mountains with John A. Lind and Claude Brandon in 1898?
A. I couldn't say as to the date whether I was or not.
Q. Was you with John A. Lind at the time he met with his death?
A. No, sir, I wasn't. I didn't cross the mountains.
Q. Was you with him on that trip?
A. I was with him to Sisters, Crook County, Oregon.
Q. Where is John Brandon?

Objected to as immaterial.
903 Overruled. Defendants except.

A. I am sorry to say that he is in prison.
Q. Where have you been since 1898. At least what have you been doing and where have you been?
A. I have not kept a diary of my time.
Q. Well, in a general way.
A. I have been in the logging business and in the stock business some.
Q. Where were you?
A. I have been working for different stock men in Eastern Oregon and also in Alberta and I logged in the Siuslaw country for eighteen months, since 1898 and I also logged on the McKenzie some.
Q. What is the longest time you ever stopped in one place?
A. About twenty-five years.
Q. Where did you stop continuously for twenty-five years?
A. In Lane County I have been out during the time, but for very short periods and back again.
Q. The first twenty-five years of your life?
A. Yes, sir.
Q. Where is the longest place you ever stopped since 1898 at any one time?
A. In Crook County, Oregon.
Q. How long did you stop there?
A. That has been my home continually for three years.
Q. What one place did you stop at during the three years for as long as a month?

A. Well, I have been on my homestead steadily for eight months without being off.

Q. Where is your homestead?

A. In Crook County in the Sisters neighborhood.

Q. What are you doing in that neighborhood?

A. I am improving it.

Q. Are you married?

904 A. I am not.

Q. Batching there, are you?

A. At the present time.

Q. Make your living off the homestead?

A. Well, I can't say that I have yet, but I have been able to live at any rate.

Q. What have you been doing?

A. I haven't worked at any particular job since I have been there steady, as I have explained.

Q. Where were you July 7th of this year?

A. July 7th? Why, the best of my recollection, I was at home.

Q. How long did you remain there from July 7th until when?

A. I have not kept any account of the dates I was away, but I was not away but a few days at a time until I came across the mountain.

Q. When did you come across the mountain?

A. I don't remember the exact date that I started, but it was toward the last of August.

Q. Who induced you to come?

A. I had business over in Lane County.

Q. Where in Lane County?

A. At Eugene.

Q. What business?

A. The business was strictly private, my own business.

Q. Whom was it with?

A. I had some land there that I wanted to dispose of or make some other arrangements with.

Q. What land is it?

A. It is a 40 acre tract in the town 17 or 18, 1 west.

Q. Whom did you talk with about it?

A. About the land you mean?

Q. Yes.

A. I talked with a number of people in regard to the land.

905 Q. Name them.

A. I can't name them all. I wanted to sell the land, and was not able to sell it.

Q. Name any of them?

A. Mr. John Warring.

Q. John Waring or Worey?

A. Waring, W a r i n g.

Q. Of what place?

A. Of Waterville.

Q. I thought you went to Eugene to do business? Whom did you talk to in Eugene?

A. I talked with a——

Q. About that?

A. I talked with a gentleman by the name of Wheeler.

Q. What Wheeler is that?

A. He is in the abstract business.

Q. What did you say to him?

A. I got him to prepare an abstract and get it in shape to dispose of or to secure a loan on it.

Q. Whom else did you talk to?

A. Why, I left it with a firm of real estate men there, I don't remember the name. I had the names, but I don't know whether I have them with me or not. I don't think I have; I left it in their hands for sale.

Q. Where?

A. At Eugene, Oregon.

Q. Firm of real estate men?

A. Yes.

Q. You don't know the name?

A. I do know the names, but I can't recall them at the present time.

Q. Is your memory defective?

A. I am not very good at remembering names or dates; it is not defective materially I presume.

906 Q. You remember conversation very well?

A. I remember general conversation very well.

Q. What was your conversation with the real estate men then? Tell the whole of it.

A. Why merely in regard to selling the land.

Q. What did you say to them and what did they say to you?

A. I merely indicated that I wanted to sell the land, and the figures, etc.

Q. What did you say. Indicating is not anything. What did you say?

A. I told them I wanted to sell the land and they were very anxious to take it for sale and I let them have it for sale.

Q. State what you said and state what they said. You did that very readily a while ago as to a conversation that took place three years ago. Now do it as to this conversation.

A. Well, if it is a conversaition, the identical conversation that you want, I think I can give you the essential parts of it.

Q. That is what I want.

A. All right sir. I called this gentleman's name, I knew at the time, but I can't recall it particularly at this time, and I told him I had a piece of land on the McKenzie, in the McKenzie country, that is, containing forty acres, more or less as the deed calls for, and I would like to place that in his hands for sale and I would like for him to sell it as quick as possible as I wanted the money, it was the money I wanted out of the land I wanted to use it. And he told me he thought he could get me a buyer as quick as anybody in the country; consequently I left the land with him and fixed the price on it at $600 for the forty acres and he told me he would sell it for

me as quickly as possible and let me know when he had a buyer.

907 Q. Where was he to let you know?

A. At Sisters, Oregon.

Q. When was this conversation?

A. I could not give you the date of it.

Q. About when?

A. It was in September.

Q. How long ago?

A. It was this month at any rate.

Q. How long ago?

A. The first part of the month.

Q. Can you give within a few days of it?

A. I would not attempt to give within five days of it, sir.

Q. Where did you go, from to Eugene?

A. I went back to Walterville.

Q. Where is Walterville?

A. In Lane County, Oregon.

Q. What kind of land was this, a timber claim?

A. There was some timber on it, very little.

Q. Where did you get it. Had you taken it up as a timber claim?

A. I got it of Miss Emma Irrickson.

Q. Did you buy it?

A. Well, I have got it, she didn't give it to me.

Q. What did you do at Walterville?

A. I was visiting there, helping my stepfather a little.

Q. How long were you there?

A. I was there several days. I wouldn't attempt to say the exact number.

Q. Where did you go from there? Who is your stepfather?

A. A man by the name of McFern.

Q. Where did you go from there?

A. Do you mean last, from there?

908 Q. No, immediately from there.

A. Why, I went from Eugene from Walterville once and possibly twice; I would not be positive as to that, and from Walterville last I came to Portland.

Q. When did you leave Walterville for Portland?

A. It has been nearly two weeks ago, possibly a little over.

Q. How did you come to come to Portland?

A. Dr. Gesner telephoned me to come.

Q. Telephoned you where?

A. To Walterville.

Q. What prior talk or communication had you had from him?

A. I wrote him I was going to return to Crook County, that I would be ready to start within two or three days.

Q. What were you writing him for?

A. He asked me prior to this—I had met Dr. Gesner before—if I would come down here as a witness? Without being subpœnaed or if he would have to subpœna me and I had told Dr. Gesner that if I had to come at all, I would just as soon come on a telephone mes-

sage as to have to be subpœnaed as I did not know where I would be at the time of the trial. And Dr. Gesner told me if I would come without being subpœnaed it would save him some trouble getting a subpœna for me in case he did not know where I would be, if I would let him know, and that is the reason I came on a telephone message.

Q. And it might take the prosecution by surprise, did he say?

A. Why, he didn't say, no, sir.

Q. And when did he first tell you this? When did he first talk to you about coming?

A. In Prineville. I could not give you the date. I did not keep any date.

Q. Haven't you any idea?

A. Why, it was in August if I remember right.

Q. How early in August?

A. I would not say whether it was past the middle or before.

Q. Whose office was it in?

909 A. Dr. Gesner's own office.

Q. Who was present?

A. Dr. Gesner and myself.

Q. Anyone else?

A. No sir.

Q. How much did he agree to give you for coming?

A. He told me that he would pay me just the same as though I was subpœnaed, if I would come without a subpœna; about half of my expenses I presume.

Q. That is all you were to get?

A. The same as government witness in any case, or in case I should have been subpœnaed here.

Q. You have been here two weeks then?

A. I have, close to two weeks.

Q. Where have you been living?

A. I have been at 330 Taylor Street.

Q. Have you had any talk with the attorneys for the defendants, since you have been here?

A. Why, I have seen them a number of times, I have had several talks with them.

Q. When was the last time you saw them?

A. I was in their office this morning.

Q. When was the last time before that?

A. I believe day before yesterday evening.

Q. Which one of them did you see then?

A. I don't remember seeing either one of the attorneys. I was in the office.

Q. Whom did you see?

A. I could not be positive whether I seen both Dr. Gesner and Mr. Williamson, but there was one of them there I am sure, but we had no particular talk.

Q. Whom did you see last night?

A. I saw Mr. Williamson and Mr. Bennett.

Q. Where?

910 A. They came up Taylor Street.

Q. To your room?

A. No, sir, they did not.
Q. To the house where you were stopping?
A. Yes.
Q. What sort of a house is it? Private House?
A. It is a private rooming house; yes.
Q. You had a talk with them there, did you?
A. They came to see if I was there, yes.
Q. How long were they there?
A. Merely long enough to ask for me.
Q. How long did they stay?
A. Why, I presume only a minute or so.
Q. Did you go out with them?
A. I did.
Q. I thought you said they were only there long enough to see whether you were there.
A. I did say so.
Q. You came out with them; where did you go with them?
A. I walked down a couple or three blocks with them towards the Imperial Hotel.
Q. Did you go in?
A. I did not.
Q. Where did you go then?
A. I went back to my room.
Q. Did they tell you to keep out of sight during the two weeks you were here?
A. They did not.
Q. Have you been keeping out of sight?
A. I have not.
Q. Been attending court?
A. I have been to court Friday, I believe, and Saturday and Monday.
911 Q. Listening to the testimony of the witnesses, were you?
A. Why, a little, I didn't stay here regularly. I have been to the Fair a number of days, and been around the town.
Q. How did you happen to be up in that country at the time these timber claims were being taken up? Where were you going then?
A. I was going to Eastern Oregon, from Lane County. I had been in the lumber business on the Siuslaw and got washed out and pretty badly used up, lost something like $4000 worth of logs in the flood and was feeling rather on the blue order, and didn't feel like logging at the present time, and I went out there with the idea of taking up a homestead and possibly locating in the country.
Q. I thought you were on your way to Idaho; wasn't you?
A. When I met Campbell Duncan?
Q. Yes.
A. No sir, I was not.
Q. Did you say you were?
A. I did not.
Q. You didn't tell him that?
A. I did not.
Q. Didn't tell anybody that?

A. I did not.

Q. How did you come to go to Campbell Duncan's house?

A. I was on my way to Vale, Oregon, in the eastern part of the State. I had a younger brother there, by the name of Fred and he wanted me to come out to where he had located and I had started at that time, thought I would go up there, and I came along where Campbell Duncan was living.

Q. Did you know Campbell Duncan?

A. I did not.

Q. What kind of a night was it?

A. You mean that I arrived there?

Q. Yes. Was that right in town or out of town?

912 A. He was stopping with a man by the name of Adams, Eight or nine or eleven miles from Prineville; I think somewhere from eight to twelve miles. I think I got there probably anywhere from five to seven o'clock.

Q. What sort of conveyance were you in?

A. I was a horse back; Had one pack horse.

Q. You stopped over night?

A. Yes.

Q. What talk took place between you and Campbell Duncan that night?

A. Do you want the conversation?

A. Yes; I want the conversation.

A. Exactly as it happened.

Q. Yes.

A. Well, I don't know as I can give that exactly, but I shall give such of it as I can. Campbell Duncan came out to my camp, I am not confident whether him or Mr. Adams came first, but they were both there and Campbell Duncan told me—we talked over the timber proposition that there was lots of timber locating in the country, and Campbell Duncan told me that Dr. Gesner was going to be at the shearing plant some twenty miles west of there or something like that, the next day, I believe it was, I would not be positive as to that, and that he was going to locate people on land, and wanted more people to locate, and he kept talking with me until he got me in the notion of going with him. So I turned my horses out in Campbell's pasture and went up with Campbell Duncan and his wife.

Q. Now let us go back to the conversation; You were going to give it all. What was it he told you?

A. Why, he told me that Dr. Gesner was rustling for 100 men I believe, he wanted a great many men to take those claims, and he was sure if I went, that I could take a claim as well as he could.

913 Q. Didn't tell you what you could make out of it?

A. Why, he told me the best he understood there was $75 and there might be a chance to make more.

Q. That is what induced you to go up?

A. Yes.

Q. You were broke?

A. Indeed I was not.

Q. I thought you said you had lost at the logging camp.

A. I had lost the winter before, but I didn't say I had lost all I had. I had lost from $3000 to $4000 worth of logs.

Q. You didn't have money to prove up on timber claims?

A. I didn't have but $125 with me.

Q. You had $125 with you?

A. I did.

Q. You concluded to go out to see whether you could make this $75, or not?

A. Well that is evidently what I went along for, and if there was a chance to make more I should liked to have had that.

Q. When you got out there, you saw Dr. Gesner. You never had seen him before in your life?

A. I had seen him at Prineville, but I wasn't personally acquainted with him.

Q. And when you got up there, didn't take Dr. Gesner off to one side and talk to him yourself?

A. I did talk to him privately.

Q. Took him off to one side.

A. Well, I taken him probably out of hearing of the others, at least, and talked with him privately.

Q. You were very insistent upon knowing how much there was going to be in it, was you not?

A. I was not particularly insistent. I wanted to know if I taken a claim there, what the resources were for handling the timber, it looked to me like it was a long ways from the railroad, and no
914 river there that a man could drive it down, and it occurred to me that without more definite arrangements that I had previously heard of it was not a good investment for me to put in.

Q. It didn't look like very good timber, either, did it?

A. The timber was very fair for fine timber.

Q. It was very fair?

A. Yes; I considered it very fair.

Q. Didn't you talk with Gesner? In this talk you had with him, a part of it was in the presence of Campbell Duncan and Frank Ray, was it not?

A. I did not talk to Gesner anything in particular in the presence of anybody that I remember of.

Q. Didn't this conversation take place between you and Dr. Gesner; Didn't you insist on knowing whether he would give you a positive agreement to pay the $500 to put up the money and pay you the $500 and pay difference as soon as you got the final receipt?

A. I did not.

Q. Didn't you ask him if he would put — in writing?

A. I did not.

Q. And didn't he say that he could not put it in writing but that he would take it?

A. I did not. I did want to know if there was a chance to sell it, but I did not ask Dr. Gesner in the presence of anybody, whether

he would put it in writing, or whether he would buy it, or whether he would do anything at all.

Q. You knew there was a chance to sell it, didn't you?

A. I didn't know whether there was or not?

Q. You heard what he was having it taken up for, didn't you?

A. I did.

Q. For the grazing and range?

A. I heard that.

915 Q. Sheep range?

A. I heard that.

Q. You heard him say he would give $500 that they were worth $500 on the day they were proved up.

A. I heard him say that in case they wanted to sell when they got their patents, it would be worth at least $500 to him.

Q. Duncan had told you he said that he would give $500?

A. Yes, sir, Duncan told me somthing to the effect enough to interest me, at any rate, and got me to go up there.

Q. Now, did not Gesner say to you that he could not draw up any contract, because that would get him into trouble with the government, but that he would take the claim and give $500 as soon as you had the title?

A. He did not.

Q. Did he say that in substance?

A. I didn't understand it that way.

Q. Then didn't you say or some one of you say something about the homestead law, and didn't you say that was all a fraud, too, and didn't you use this language or this in substance; "It is just like this, the whole damn thing is a lie from beginning to end, anyway. Who the hell would take a homestead unless he could get something out of it," referring to the affidavit of homesteads that you have to file?

A. I don't remember any such conversation as that?

Q. You don't remember that?

A. No sir.

Q. Do you swear you did not say that?

A. I am confident that I did not say that.

Q. You will swear positively you did not say that?

A. Yes, sir, I will.

Q. Nor that in substance?

A. I don't remember the homestead law to be spoken of at all, nor the homestead act.

Q. Will you swear that you did not say in substance that

916 everybody violated the homestead law anyhow, and swore to a damned lie when they took up a claim?

A. Please state your question again.

Q. Didn't you in substance, say to Dr. Gesner that everyone who took up a homestead did in knowing that he was swearing to a damned lie, or that in substance?

A. I did not.

Q. Now you return- to Prineville about a year after that, didn't

you, in 1903? You left that part of the country right after being up to the timber, didn't you?

A. I didn't particularly.

Q. Where did you go to?

A. I didn't leave Crook County.

Q. Where did you go to from Prineville?

A. From Prineville, if I remember right, I went to the Willow Creek Basin what is now called—well the name of the town I can't just call at present; I know it well, too.

Q. How far is it from Prineville?

A. Something like thirty miles.

Q. How long did you remain there?

A. For several days.

Q. Where did you go from there?

A. I went to Shaniko.

Q. How long did you remain there?

A. Something less than a month.

Q. Where did you go from there?

A. I went to Beaver Creek.

Q. How long did you remain there?

A. I worked there for four months and a half.

Q. Where did you go from there?

A. To Sisters.

Q. How long did you remain there?

A. That has been my home continually ever since, with
917 the exception of the time I have been away some it has been my home.

Q. You have made it your home?

A. Yes sir.

Q. You filed a homestead there?

A. Yes sir.

Q. You got back on it once in six months I suppose.

A. Well, I aimed to, yes sir.

Q. Have you cultivated it any?

A. I have.

Q. How much?

A. I have fifteen acres under cultivation.

Q. Fenced?

A. Yes, sir.

Q. After you got back to Sisters and took up the homestead you went into Prineville, didn't you?

A. Why, I have been in Prineville several times in the last two years and a half.

Q. About one year after you had been up to the timber and in Prineville didn't you have a conversation with Frank Ray, and didn't you tell him that the reason you did not take a timber claim at that time was because there wasn't enough in it?

A. I don't remember having any conversation with Frank Ray at all regarding timber.

Q. Will you swear you did not say that to him?

A. I am positive I have never met Frank Ray to my knowledge except once, from the time we were up there in the timber until since I came here to Portland at the trial.

Q. When was that once?

A. I met him on the road east and north of Prineville. I don't remember the name of the stream he was on, but I was going up to look after some horses I had, and I met Frank Ray, if I remember right, and I might possibly be mistaken in meeting him there; it might have been some one else.

918 Q. When was that?

A. That would have been in May or June, 1903.

Q. Did you tell him on that occasion at that place that the reason you did not take a timber claim, referring to the time you went up there when Dr. Gesner was there, was because there wasn't enough in it for you?

A. No, sir, I did not.

Q. Or that in substance?

A. No sir.

Q. Did you have a talk with Campbell Duncan in Prineville in 1903, about a year after you had been up there, in which you told him the reason you did not take a claim there was because there wasn't enough in it?

A. I have met Campbell Duncan a number of times, but whether I met him at Prineville, I would not be positive since the time in 1902 that we were up above.

Q. Did you tell him that on any of those occasions?

A. I don't remember having told him that in substance.

Redirect examination:

Q. What was the reason you did not take up a timber claim?

A. It was the mere fact that there was no, as Mr. Heney has stated it—he did not ask his question so that I could answer it just as I would like to—that there was nothing in it that I could see from the fact that there was no market for the timber. That was one reason I did not feel like putting in my time there and taking my chances on Dr. Gesner feeling like it might be worth $500 to him or more when I got my patent. I did not know Dr. Gesner and I did not know but what he might not want it; he would not obligate himself in any way by his word. It did not occur to me—he did not talk as though he was going to, and that was one reason I did not take it particularly.

Q. When was this conversation that has been referred to as a private conversation between you and Dr. Gesner relative to the time when Dr. Gesner made the talk to the people there that you

919 have mentioned? That is, was it before or after?

A. I would not be positive as to that; I think it was before.

Q. You were not a witness at either of the other trials were you?

A. I were not.

Q. You may state whether you were in Prineville during the second trial of this case or not.

A. I were.

Q. Were you in M. R. Elliott's office?
A. I was.
Q. You may state whether or not at the time you learned what some of the witnesses were testifying to*o*, relative to the talk of Dr. Gesner?
A. I did.
Q. How did you learn it?
A. I picked up the Oregonian, and I was in Mr. Elliott's office; I was waiting for him. I waited some twenty-five or thirty minutes, and read part of the trial; I read Campbell Duncan's evidence in part, and that is how I learned any part of the evidence.
Q. Did you tell Mr. Elliott what you remembered about it?

Objected to.

Mr. WILSON: I am not asking him to tell what he said to Mr. Elliott, but if he told Mr. Elliott what he said about that conversation, I think that would be competent.

The COURT: He may answer as to the fact.

Q. Did you say anything to Mr. Elliott at that time about your recollection of what the Dr. said?
A. I did.
Q. Do you remember whether or not Mr. Elliott telephoned immediately to Portland?
A. He told me he did.
Q. Were you informed that you could not get to Portland during that trial?
A. Mr. Elliott told me he would like to have me go down and that he would telephone. I told Mr. Elliott that I could not well go.

920 Mr. WILSON: Well, we do not ask for that conversation.

Q. You may state whether you were informed — it too late in the trial for you to arrive in Portland in season.
A. I say Mr. Elliott stated it was too late for me to arrive in time to get to the trial.

Mr. HENEY:

Q. You don't mean that you made any effort to get the case to wait for him.

Mr. WILSON: We are not saying that we undertook to subpœna him, we say it was too late in the case.

Q. You may state to the jury whether or not you had seen Dr. Gesner or any of these defendants between the time of your trip up to the timber and this talk you had in Elliott's office, and had never talked with them about this case at all?
A. Please state the last part of the question again.
Q. You may state whether or not you had had any talk with any of these defendants or their attorneys between the time when you were up there at the timber, and the time you had this talk with Mr. Elliott, during the second trial you had mentioned, and talk about this case?
A. I had not.

Q. You may state whether or not you told Mr. Elliott the same story you told here.

Objected to as incompetent. Objection sustained.
Defendants except.

Q. Last night when you saw Mr. Bennett and myself what was the subject of the conversation relative to the time you were to appear as a witness or something else?

A. Yes sir.

Q. How much experience have you had in lumbering with timber; considerable?

A. I worked in lumbering contracting and also worked some by the day; very little by the day, but I have contracted more or less for the last six or eight years.

Q. Are you able to tell approximately the amount of tim-
921 ber on a section?

A. I would be by looking it over. I have never missed it very far.

Q. When you were up there that trip did you make any special examination of any particular tract of land?

A. I did not.

Q. You made no filing?

A. I made no filing.

Q. Would you be able to say now what in your judgment would be the amount of timber upon any particular quarter section up there?

A. It would be only in a general way.

Q. And that only with reference to the timber in general?

A. Yes sir; The timber which I saw on the road, the timber indicated by Dr. Gesner as the timber he wished located.

Q. What in your judgment, would that run to the quarter section?

A. Well, what I seen, I should judge it would run from a million to a million and a half to the quarter section provided it was all like what we seen along the road, that the Doctor had told Campbell Duncan and myself to look at.

Q. You may state whether or not you heard anything said in this talk by the Doctor about a written agreement or writing at all.

A. I did not.

Recross-examination.

Q. How much of this township 15-19 did you see?

A. I don't know whether I seen it at all or not, Mr. Heney as to the number.

Q. How far did you go with reference to the Gesner and Williamson shearing plant?

A. I went to the shearing plant.

Q. How far east of the shearing plant did you go?

A. Only a very short distance.

922 Q. Did you say you saw no land in going along Veazie Creek road? You went along that road didn't you?

A. I don't know whether we went along Veazie Creek or not.

Q. You went the wagon road from Prineville to the shearing plant, didn't you?

A. Well, I went with Campbell Duncan and it occurs to me he left the wagon road.

Q. Are you sure in going to the shearing plant you saw any land where the timber would go as high as a million feet?

A. My judgment is the land that is west of the shearing plant that Dr. Gesner indicated as the land he would like to locate, and told Campbell Duncan and myself to locate, would go from a million to a million and a half if it were all like that along the road that we seen.

Q. Did you go and look at it?

A. I did not go to look at it.

Q. Where was what you saw going along the road? Where did he indicate he wanted you to see?

A. It was on the west of the road, on the south of the road going toward Prineville.

Q. On the south of the road?

A. Yes sir.

Q. And the road runs right along the head of Veazie Creek at the place you mention?

A. I would not say where it runs; it might be——

Q. Well, it was right along side of a creek, was it and the creek was running east and west at that place?

A. I think there was a small creek running west.

Q. A small creek running west?

A. I think so.

Q. Who was this knocked-kneed man you have been running around with here the last few weeks.

923 A. I am not aware of the fact that I have been running around with anybody the last few weeks.

Q. You have been with him a great deal, a little fellow.

A. I have not been with anybody in particular that I can remember at the present time.

Q. You haven't been with anybody?

A. Not any body at all.

Q. Is there any man you have been with frequently? Do you know a man that description fits, knocked-kneed?

A. No sir, I don't.

Q. You always kept too close to him to see; did you?

A. You don't refer to Mr. Bennett, do you?

Q. No.

A. Mr. Bennett and I were down the street last night with Mr. Wilson. They are the only men I have been with in particular that I know the names of.

Q. Have you been going around with some man that you don't know the name of?

A. I have been to the Fair a number of days. Five or six or seven.

Q. With some man?

A. I haven't started out with any man that I know of in par-

ticular. I have travelled with a street-car where there was quite a crowd.

Q. Do you know George Barnes?

A. I know him by sight.

Q. Only by sight?

A. Yes.

Q. Do you know C. Sam Smith, sheriff of Crook County?

A. I know him by sight also.

Q. Only by sight?

924 A. Yes. I have met him, been introduced to him several times—that is I have met him several times, but I am not what I should call personally acquainted with him or well acquainted with him.

Redirect examination.

Q. You may state whether you ever talked with Barnes or Smith about this case.

A. I have not.

Q. Have they to you?

A. No, sir.

Q. You may state whether or not you have seen Mr. Barnes and talked with him since being down here in Portland this last trip?

A. Since being to Portland?

Q. Yes, the last two weeks or such a matter.

A. I have talked with him in the Prineville Hotel—I mean the Imperial Hotel.

Q. How is it about Mr. Smith?

A. I have met Mr. Smith a time or two but have not talked with him anyways in particular at all, just in a general way.

Recross-examination:

Q. When you were in Prineville during the second trial, was that the first time you had been in town since the first trial commenced, July 7th?

A. Yes, sir, I think it was.

Q. You didn't go in on the 4th of July?

A. No, sir.

Q. And you were not in town? Were you out at Sisters?

A. I were.

Q. You did not go in town from the 4th of July up to the time that the second trial was going on?

A. I did not.

Q. Can you place that date?

A. The date I went to Prineville?

Q. Yes.

925 A. I cannot.

Q. How long were you in Prineville that time?

A. I believe I got in in the morning about six o'clock and left that same day.

Q. What time that day?

A. I think afternoon.

Q. Did you do any trading in the stores there that day?
A. I did a little.
Q. Any in Wurzweiler's?
A. Yes, sir.
Q. Anybody talk to you about the case, in there?
A. Arthur Hodges did.
Q. Did Wurzweiler talk to you?
A. No, sir.
Q. Did you talk to him at all?
A. I did not.
Q. Did you hear him doing any talking?
A. I did not.
Q. Who else besides Hodges did you hear talking?
A. Nobody in particular that I can remember at all.
Q. Did Hodges tell you that those witnesses ought not to be going against the most prominent men in the county and injuring them in that way?
A. He did not.
Q. Did not express any opinion in regard to it?
A. He expressed the opinion that they were wrong to a certain extent that they certainly misunderstood it.
Q. That they were doing a great injury to the county?
A. He did not state that?
Q. Or that in substance?
A. No, sir.
Q. You didn't hear anybody making that talk?
A. I did not.

926 Q. Wasn't everybody you talked with in town talking about the case?
A. They were not.

Q. Was not much talk going on about it?
A. I did not talk a great deal about the case myself; I didn't hear a great deal.
Q. Were you around the saloons?
A. A very little.
Q. Which saloons were you in?
A. I think I were in O'Neal's saloon.
Q. Any talk about it going on in there?
A. I never heard a word about it in O'Neal's saloon.
Q. In any other saloon?
A. I was not in any other saloon.

Redirect examination:

Q. When you say Hodges said they were wrong, whom was he referring to?
A. The witnesses.

Excused.

927 SEPTEMBER 20, 1905—9:30 a. m.

Trial resumed.

The COURT: Yesterday there was a witness upon the stand, Branton, who was asked as to the whereabouts of a brother of his. I asked Miss Fleming to read me a part of his testimony this morning and it appears that he answered, "I am sorry to say he is in State's Prison." There was an objection to that. I did not hear the witness at all. I supposed he was answering locating him geographically. I would have sustained the objection if I had known the na-ute of the answer of the witness. I regard it as immaterial, and it ought to go out. I did not hear a word the witness said; it was so hard to hear in this room. That may be withdrawn entirely, and you may disregard it entirely, gentlemen of the jury.

928 Thereafter on rebuttal one Campbell Duncan was called as a witness by the Government and asked the following question; Q. Mr. Duncan when you first saw Clarence Branton—the witness hereinbefore referred to—there (at the Adams Ranch) what did he tell you if anything, as to where he was going?

Objected to by the defendant as not proper rebuttal.
Objection overruled and defendant excepted. Witness answered.

A. He said he was going to Idaho, on his road there.

And thereafter the witness was asked the following question, "Did you have a talk with Branton in Prineville in the year 1903 about a year after you had been up to the timber? A. Yes sir. Q. And in that talk did Branton tell you that the reason he did not take up a claim was because there wasn't enough in it?

To which the defendant objected, that no sufficient foundation was laid for impeaching, time, place and persons present not being called to the attention of the witness. The objection was overruled, to which ruling the defendants excepted, and the witness answered: "Yes sir." Q. Was it about a year after you were up in the timber, as near as you can fix the conversation? A. Why, I think it was in May. We were up there in June and I think it was the next May if I remember right.

The following is all of the testimony of the aforesaid witness Campbell Duncan introduced at the trial.

929 PORTLAND, OREGON, *September* 11, 1905—9.30 a. m.

Mr. HENEY: I find that I overlooked offering in evidence the sworn statement of Ernest Starr, while he was upon the stand. We will offer it now.

Marked "Plaintiff's Exhibit 15."

CAMPBELL DUNCAN, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. HENEY:

—. Mr. Duncan, where do you reside?
A. Near Prineville.
A. How long have you lived there?
A. About seven years.
Q. Do you know these defendants?
A. Yes sir.
Q. Mr. Williamson, Mr. Gesner and Mr. Biggs?
A. Yes sir.
Q. How long have you known Mr. Williamson?
A. I have known him by sight for something like five years.
Q. How long have you known Mr. Gesner?
A. Seven years this winter.
Q. How long have you known Mr. Biggs?
A. The same length of time.
Q. Have you been in the employ of Williamson & Gesner at any time?
A. Yes sir.
Q. When?
A. This spring.
Q. Were you a witness before the Grand Jury in February this year?
A. Yes sir.
930 Q. Was it before or after that you were in the employ of Williamson?
A. After.
Q. Were you a witness at the first trial?
A. Yes, sir.
Q. Were you in their employ up to that time?
A. Yes sir.
Q. Are you still in their employ?
A. No sir.
Q. Have you finished it?
A. Yes.
Q. Putting up a fence?
A. Yes, sir.
Q. Did you file on a timber claim in 1902?
A. Yes sir.
Q. Who, if anybody, first spoke to you about making a filing?
A. M. R. Biggs.
Q. I wish you would go on and tell the whole story; what was done about it; what was said; all about it. Tell it to the jury.
A. Why, we met in Prineville—in a conversation after we had met on the streets—I don't know how the talk came up, who mentioned first about the timber. There was quite an excitement in that country about timber up the Des Chutes River, and I don't remember whether it was himself or myself that first spoke about it,

but he asked me if I had used my right; said that if I would locate up near the shearing plant that Dr. Gesner would loan me the money to prove up on the claim.

Q. Go on, tell the whole story.

A. Well, I said something to him about selling it, and he said when I acquired the title that Gesner would buy it and pay me $500. He said he could make no contract but *he* could understand one another in regard to the price to pay for it.

931 Q. Anything said about how much that would leave you?

A. He said about $75.

Q. Anything said about when you were to go up to the timber?

A. I think he said it was the next day. If I wished to locate to go up to the shearing plant; that Dr. Gesner would be up there and I could see him.

Q. Anything said about your wife?

A. He said if my wife wanted to take a claim, why to take her along with me.

Q. Did you tell him whether you would go or not?

A. I don't remember as I did.

Q. Did you go the next morning?

A. Yes.

Q. Who went with you?

A. My wife and two children and a young man by the name of Branton.

Q. In this talk about taking your wife with you, what, if anything, did he say as to the terms on which she could take up?

A. Well, it would be on the same terms as myself.

Q. Did you say anything to her before you started as to what you wanted her to do?

A. Well, I talked to her about it.

Q. What did you tell her?

A. I told her what Biggs had told me.

Q. Then you went on up to the timber. Now, when you got there, whom did you see?

A. At the shearing plant?

Q. Yes.

A. Well, there was Green Beard; Frank Ray; their wives, and one of the Wakefield's, and other parties there. I don't remember their names.

932 Q. Did you hear Dr. Gesner say anything up there in regard to your filing, if so, who was present when he said it?

A. Well there was several standing around—Green Beard. And we had a talk after noon.

Q. That was after you had lunch, was it?

A. Yes sir.

Q. Do you remember anyone besides Green Beard who was there?

A. Ray was there. Frank Ray, and I think Frank Beard was present.

Q. What did Gesner say?

A. Why, he said that he would loan us, I think it was $450 or

$475 when we proved up and gave him a mortgage on the land, for thirty or sixty or ninety days, something like that. When we were ready to turn it over, he would pay the balance; the remainder of the $500 for the deed.

Q. Was anything said by you folks in reply to that?

A. I don't remember anything.

Q. What was said about which piece of timber you were to file on if anything?

A. He told me to go back down the road, and from there to go half a mile south, and I would be on the land.

Q. What about your wife?

A. About her going?

Q. Yes.

A. Well, he said for us to go.

Q. Was her piece there also?

A. Yes, they joined together the two pieces.

Q. Did you go there?

A. Went down the road.

Q. Did you go to the land?

A. No.

Q. You didn't go to the place he told you?

A. No, I didn't leave the road.

933 Q. Then did you go on into town and file, or when did you file after that?

A. I don't know whether it was the next day or a day or two afterwards.

Q. Is that the road that runs along Veazie Creek that you were on?

A. Yes, sir.

Q. Here is the sheep shearing plant; this road runs along here?

A. Yes, that is the road.

Mr. HENEY: That is along Veazie Creek; this is the filing of Duncan, and this is Mrs. Duncan's (referring to plat).

Q. Could you see the land from the road, as to whether it was timbered or not, or how well timbered?

—. ——.

Q. Which side of the road did you think the land was on as you went in?

A. As I went in?

Q. Well, as you were going to Prineville. Which side of the road did you think it was on?

A. It was on the south side.

Q. Oh, you said it sloped toward the north?

A. Sloped down toward the north.

Q. Who gave you the numbers of the description of the land?

A. He told me Mr. Biggs would have it in town.

Q. Who told you?

A. Mr. Gesner.

Q. And when you came to town, you said on the following day, you went to file?

A. I don't remember whether it was the following day or a day

or two later. It might possibly have been Saturday when I went up there, and not until Monday that I filed.

Q. Who went with you when you went to file?

A. To town?

Q. No, when you filed before Biggs, who went to Biggs' office with you?

934 A. My wife was with me.

Q. Any one else?

A. I think Green Beard and his wife were there; there might have been others. I don't remember now.

Q. Who went back to town with you, anyone besides your wife and children?

A. I think not.

Q. You appeared before Biggs; did you, to file?

A. Yes sir.

Q. Did you sign these two papers at that time?

A. Yes sir.

Q. Were you sworn to them by Mr. Biggs? What is your recollection as to that?

A. I don't remember, I suppose I was.

Mr. HENEY: We will offer those in evidence.
Marked "Plaintiff's Exhibit 16."

Q. Did your wife sign two papers at the same time, and is that her signature on each of those?

A. Yes sir.

Mr. HENEY: We will offer those in evidence.
Marked "Plaintiff's Exhibit 17."

Q. Now, at the time that you signed those papers, did you have any talk with Mr. Biggs about them? Can you recall anything that was said there?

A. No, I never remember anything that was said while I was there in his office.

Q. Do you remember as to whether he read the paper to you?

A. I never could recall it.

Q. Did you have money enough to take up a timber claim at that time?

Objected to as immaterial and incompetent.
Objection overruled.
Defendants except.

935 A. No, I didn't.

Q. You were working for wages, were you?

A. Yes sir.

Q. What were you working at then?

A. I was working for a man named Adams, on his place.

Q. On a farm?

A. Yes sir.

Q. Do you remember reading this paper at the time you signed it, or was your attention in any way called to this statement in it?

"That I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly, or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States shall inure in whole or in part to the benefit of any person except myself."

A. No, I don't remember of reading it, I might have read it.

Q. Do you remember as to whether anything special was said about that, and as to your right to have any agreement or understanding with Dr. Gesner or any one else as to what was to become of the land after you got title? Do you remember whether Mr. Biggs said anything about that at the time?

A. Who was to get the land?

Q. Yes, or what right you might have?

A. He said we could have an understanding. We could not make any contract.

Q. What did you understand by contract?

Objected to as immaterial and incompetent.

Objection overruled.

Defendants except.

A. I thought that it had to be drawed up in writing.

Q. Now, at the time that you signed this what was your
936 intention as to what you were going to do with the land when you got title?

Mr. BENNETT: That all goes in subject to our objection, I suppose, your Honor?

A. I intended to let them have it.

(COURT:)

Q. Intended what?

A. To let Gesner have the land.

Q. To let him have it for what consideration?

A. For the remainder of the $500; that would be about $75.

Q. Who was to furnish the final proof money?

A. Gesner.

Q. Now who attended to the publication of the notice, do you know, and payment to the newspaper?

A. They did.

Q. You didn't do anything about it?

A. No.

Q. After signing these papers, did you take them with you, or what did you do with them?

A. No.

Q. What did you do with them? Leave them there with Biggs?

A. I think so.

Q. Now, after that, did you make final proof?

A. No sir.

Q. Well, was the notice published for you to make final proof?

A. Yes.

Q. Well, before the time arrived, did you have any talk with Gesner about it?

A. Not until just before I was to prove up, a few days.

Q. You then had a talk with Gesner, did you?

A. Yes sir.

Q. How did you come to have that talk? Did you meet him accidentally, or how did you come to meet?

A. I was working at the livery stable in Prineville; he came down and said to go with him to his office.

937 Q. You went with him to his office?

A. Yes.

Q. What did he say when he got you there?

A. Well, he commenced talking about the matter before we got to his office.

Q. Yes, and what did he say?

A. I don't remember all he did say as we went along.

Q. Give the substance of what you remember.

A. I think he said he couldn't let me have the money to prove up on the land.

(JUROR:)

Q. How is that?

A. He said he couldn't let me have the money to prove up on the land.

Q. Did he say why?

A. I don't remember now what he said at that time.

Q. Do you remember anything else that was said on the way up there?

A. No, I do not.

Q. When you got to the office, who was there, if anyone?

A. Williamson was in the office.

Q. Did you go into the office.

A. Yes, sir.

Q. How large a room is it?

A. I suppose about 10 x 12.

Q. What was said by Gesner or Williamson in the office?

A. Mr. BENNETT: I suppose this all only goes in as against the one who was present?

—. No, it goes in against all of them.

Mr. BENNETT: Well we object to it then, as incompetent.

Objection overruled.

Mr. BENNETT: We take an exception as to defendant Biggs particularly at this time.

A. Why, I never had received an introduction to Mr. Williamson. When we went into the office, we was introduced, and Dr. Gesner picked up the Oregonian and handed it me, and told me

938 to read the piece that was in it.

Q. What was it headed? Do you remember any of the heading?

A. Yes. It seemed like it said something about a hit at the sharks, or something like that.

Q. Do you remember the date that you were in that office having that talk, or about the date?
A. No.
Q. Did you sign any paper on the same day?
A. I don't remember whether it was on that day or the next.
Q. Well, on that day of the talk or the next day, you did sign a relinquishment, did you?
A. Yes sir, near that time.
Q. Is that your signature upon that paper?
A. Yes sir.
Q. Is that your wife's signature?
A. Yes, sir.
Q. How did she come to sign?
A. Well, she came in town either that day or the next or near that time; I know it was within a few days anyway.
Q. What induced her to sign that relinquishment.
A. I told her that we couldn't get the money, to prove up, and we wanted to relinquish.
Q. Then you both signed and went before Biggs?
A. We went before Biggs and then signed those papers, yes, sir.

Mr. HENEY: We will offer those relinquishments in evidence. They are dated the 29th day of November, 1902, each of them.
Marked "Plaintiff's Exhibit 18" and "Plaintiff's Exhibit 19."

Q. I will call your attention to an article in the Oregonian, of date November 24, 1902, which is headed "Hits the Sharks, Secretary Hitchcock on Public Lands. Points to Oregon cases." Is that the article?
939 A. Why, it looks like it.
Q. Can you tell what the substance of it was you read in it?
A. I can by reading some of it. (Witness examines article.) That reads the same.
Q. You think that is the article then?
A. Yes sir.
Q. What was said after the paper was handed you to read and you read it, by either Williamson or Gesner?
A. Gesner said that I better go and relinquish; that Hitchcock was mad.
Q. Do you recall anything else that was said?
A. No, I don't at this time.

Mr. HENEY: We will offer that part of it in evidence that applied to this matter.
Mr. BENNETT: What part of it? The whole article?
Mr. HENEY: You can have the whole of it if you want, but we don't care for anything except down to here. That relates to timber claims; the balance relates to mining claims.

Q. Which part of the article did you read?
A. I read down to where it was speaking about the entrymen.
Q. Down to where it said about punishment for violators of law?
A. Yes, sir.

Mr. HENEY: That is the part we offer; the part that was then read; the article down to that reads as follows:

"Hits the Sharks.

Secretary Hitchcock on Public Lands.

Points to Oregon Cases.

Urges Early Appeal of the Timber and Stone Act and Penalty for Law Violators.

Bold Words on the Evil of Fencing the Public Domains by Private Interests—New Irrigation Law, Forest Reserves.

Oregonian News Bureau, Washington, D. C., Nov. 23.—
940 The recently discovered timber frauds in Oregon are rather widely exploited in the annual report of Secretary Hitchcock of the Interior Department, and held up as a forceful argument for the immediate revisions of the Timber Laws. Although the Secretary cites facts and figures heretofore published in the Oregonian, he is gracious enough to omit from his official report the name of the state in which these frauds were discovered. His comments, nevertheless, are so pointed and so explicit that they cannot be mistaken. After showing the phenomenal increase in entries in Oregon under the Timber and Stone Act, in the last quarter, over those of the preceding three months, the Secretary says: "Should this rate of entry continue during the entire year in that state, it would mean the acquisition in round numbers, of 600,000 acres of timber lands under the Timber and Stone Act, and if the same activity in that class of entries were extended to the other public land states, then before the expiration of two years practically every acre of unappropriated public timbered lands would have ben absorbed, and the successful operation of the Reclamation Act of June 17th last rendered doubtful, if its failure be not absolutely assured, for the reservation of public timbered lands that must of necessity be made to assist in conserving the waters to be impounded by the irrigation systems to be established under that act will be defeated or made so expensive by the purchase of said lands from private owners as to greatly delay the completion of the irrigation systems contemplated by that act.

"The reports of the special agents of this department in the field show that, at some of the local land offices, car-loads of entrymen arrive at a time, every one of whom makes entry under the timber and stone act. The cost of 160 acres of land under that act and the accompanying commissions is $415. As many as five members of a family who, it can be readily shown, never had $2075 in their lives, walk up cheerfully and pay the price of the land and
941 the commissions. Under such circumstances, there is only one conclusion to be drawn, and that is where a whole carload of people make entry under that act, the unanimity of senti-

ment and the cash to exploit it must have originated in some other source than themselves.

"Punishment for Violators of the Law.

"In all such cases a rigid inquiry will be instituted, to determine the *bona fides* of the entry, and if it be ascertained that the entry was not made in good faith, but in the interest of some person or persons other than the entrymen, the entry will be promptly cancelled and the proper criminal proceedings instituted against the entrymen."

Q. Now when you went to Biggs' Office to sign that relinquishment, what was said by Biggs, if anything?

A. Well, when I told him what I came for, he drew up them papers. I don't remember that he said anything in regard to it.

Q. What, if anything, was said about filing fees? Had you paid your own filing fees, or who had paid them?

A. I had given my note for the money.

Q. At the time you filed, you gave a note for the filing fees, did you?

A. Yes, sir.

Q. And for the publication notice?

A. Yes, sir.

Q. How much did you give the note for?

A. I think it was $19.00. I and my wife.

Q. That was for you and your wife. At the time of filing, what was said about the giving of that note? What was the conversation in relation to it?

A. Why, I spoke to Gesner in regard to letting me have the money to file. I had the money but I had use for it; he said he couldn't let me have it, couldn't or something that way, and walked away. But later on, he came back and said that Biggs would fix that up when I went up there to his office, and he drew up the note
942 when I went up there.

Q. Where were you working at that time?

A. For William Adams.

Q. On the farm?

A. Yes sir.

Q. What wages?

A. $35 a month.

Q. Had you saved up any money? Were you ahead any?

Mr. BENNETT: That is all objected to as immaterial and incompetent.

COURT: I think it is competent to show whether he had any money.

A. I didn't have very much.

Q. What do you call much? How much did you have?

A. $15 or $20.

Q. Now then, at the time that you relinquished, what was said about the note, if anything? Or what was done about it?

A. Well, after I relinquished, why Biggs had overlooked it, and then I called his attention to that note, and he handed it to me.

Cross-examination.

Questions by Mr. BENNETT:

—. Mr. Duncan you say that you were in the employ of Dr. Gesner. You mean by that that you had a contract with him for putting up some fence?

A. This spring?

Q. Yes.

A. Yes, sir.

Q. That is the only work you ever did for him?

A. All the work you ever did for him?

Q. I say is that? Yes.

A. I think that is all.

Q. How much fence did you put up under this contract, do you remember? How much fence were you to put up under the contract that you had with him?

943 A. Why I think it was something about near a mile, or a mile-and-a-quarter of wire fence, and then the rest of it was posts driven in the ground.

Q. You were working for him by the job or contract and not by the day?

A. No, I wasn't working by the day.

Q. Or month, or anything of that kind. Weren't working for a salary but by the job or contract?

A. Yes sir.

Q. What business are you engaged in now, Mr. Duncan?

A. At the present time?

Q. Yes.

A. I was a witness here before the Federal Court.

Q. Oh, well, yes, that has been your principal business for three or four months, hasn't it?

A. It seems to be.

Q. Outside of that, what business are you engaged in?

A. Well, I sometimes work for wages.

Q. Aren't you a timber locator too?

A. Yes sir.

Q. How long have you been engaged in working as a timber locator?

A. About three years.

Q. And during that time you have located quite a number of people in that country, on claims?

A. Yes, several.

Q. About now many in the Prineville country?

A. Since the time that I commenced? Since I commenced locating?

Q. Yes.

A. Something near twenty I think.

Q. You go and show them the corners and show them the land, and locate them?

A. Yes sir.

944 Q. And charge them for doing it?

A. Yes, sir.

Q. How much?

A. $100 a claim.

Q. $100 a claim?

A. Yes sir.

Q. You have been locating people on timber claims right up there in the vicinity of where these claims were located, haven't you?

A. No, not near it; in the same mountains.

Q. How far from there?

A. In the next range up.

Q. In the next township above, you mean?

A. Yes sir.

Q. And you have been figuring haven't you, Mr. Duncan, that if those claims went back to the Government, you would locate people on them?

A. Well, if I could get locators, yes.

Q. You have been planning on that?

A. Oh, I haven't been planning on it, no sir.

Q. Well, you have been talking about it haven't you, and expressed your intention to do that?

A. I told you, before here.

Q. What say?

A. I might have said that to you, here, at the trial before.

Q. Well, haven't you said it to other people up there in that country?

A. I might have said so.

Q. And you have had that in mind and talked about it up there considerable, haven't you? About that if this land went back, that you would go and locate people on these claims and get $100 apiece out of them for each claim? Now isn't that right?

945 A. I don't remember having talked about it.

Q. But you remember you had that in mind, and that you testified about it at the other trial, don't you?

A. Yes, sir.

Q. Now, at the time that these claims were taken, there were a great many people coming in from the East, weren't there, and taking claims in that country, in the Prineville country?

A. I think some of them was coming from the East.

Q. Well, a great many coming from the East, weren't there?

A. Yes, I guess so.

Q. Carloads, as Mr. Hitchcock says?

A. Well, there was no cars running into Prineville.

Q. No, but they came in carloads in Shaniko, and then in stage loads from there over?

A. Yes.

Q. And they are coming in there by carloads and stageloads yet and taking lands, aren't they? Now, right now, up there, from the east?

A. There aren't as many coming as there was.

Q. Not as many as there were, but there are a great many coming in there from the east yet, aren't there?

A. Why yes. You see some in once in a while.

Q. The stages are loaded now, aren't they, with people coming in to take timber claims?

A. I don't know. I haven't been up there for almost a month.

Q. No, you have been down here, attending to your business.

A. Yes sir.

Q. There have been two or three hundred timber claims taken in that vicinity where these claims were taken, haven't there? Some of which you located yourself?

A. What do you mean by the vicinity? Near it?

Q. Well, within fifteen or twenty miles around there?

A. Why, there have been a good many claims taken in there, yes.

946 Q. Two or three hundred, haven't there?

A. Well, I don't know just how many.

Q. You were down here before the Grand Jury, you say?

A. What time?

Q. In the first place. The Grand Jury that found this indictment.

A. Yes sir.

Q. Then you were down here at the first trial?

A. Yes sir.

Q. And at the second trial?

A. Yes sir.

Q. You have been before the Grand Jury again at this term?

A. Yes sir.

Q. During all this time, have you got pretty well acquainted with the officers of the Government?

A. Which ones?

Q. Well, Mr. Neuhausen, say?

A. I have seen him a good many times.

Q. Talked this matter over with him a good many times?

A. No, I don't know as we talked it over very many times. In fact, I don't know as we talked it over any.

Q. Never have talked it over at all?

A. Why, not about this proposition; no sir.

Q. What say?

A. I don't remember of talking it over. I talked with him a good many times.

Q. Well, about this matter, about this case, and the testimony in it, what do you know about it?

A. No, he knew what I knowed about it.

Q. Well, I say you have talked that over with him, what you knew about it?

A. No.

Q. Haven't you talked it over at all?

947 A. Not that I remember of.

Q. Do you know Mr. Burns?

A. Yes.

Q. Have you got pretty well acquainted with him?

A. Oh, not very. I have saw him every day for three weeks or more around here; around, at this time since I have been down here, and before when I was here.

Q. How has it been this time? Have you seen him a good many times since you have been down this time?

A. I saw him I suppose, every day that I was at the Court house.

Q. Do you claim that you haven't had any talk with him about this case? Or what you knew about it?

A. No, I don't think he asked me what I knew about it.

Q. But you have talked with him about the case. You admit that, do you, or don't you?

A. I think he said us fellows better give them a square deal, the Government.

Q. You had better give them a square deal, eh?

A. Something like that. To do it, or something.

Q. When did he tell you that? Since you have been down this time?

A. Yes.

Q. Did he tell you that the Grand Jury was in session and might indict you?

A. No, he didn't say anything about that.

Q. He didn't say anything about that?

A. I asked him what a square deal was, and he said to tell the truth.

Q. Tell the truth?

A. Yes, sir.

Q. Well, did you tell him that you always told the truth?

A. I told him as near as I remembered it.

Q. What say?

948 A. I told him as near as I remembered I had.

Q. And did he want you to tell something more?

A. No sir.

Q. That you hadn't told yet?

A. That was all he said.

Q. Did you tell Mr. Biggs, in Prineville, before you came down here this time, that you expected to be indicted?

A. No, I don't know as I did. We was talking. I was in his office there, and I asked him—I wondered what they was wanting us fellows for down there before the Grand Jury. I asked him if he supposed some of us fellows was going to be indicted.

Q. Didn't you tell him that you knew they were going to indict you?

A. No sir.

Q. Didn't you tell Oscar Kennard—do you know Oscar Kennard?

A. Yes sir.

Q. Didn't you tell him last July that you intended to locate people on these claims if they went back to the Government?

A. I don't think I ever did.

Q. Did you have any talk with him about that?

A. He was there when I was working for Gesner and Williamson.

Q. Well, did you tell him anything about locating people on these claims, if they went back to the Government?

A. I might have said if I could, or something; I don't remember now.

Q. Do you remember saying something of that kind?

A. No, I don't remember anything about it.

Q. Now, in answer to Mr. Heney's question, when you were a witness in the first trial, in the presence of the Court and the Jury, you were asked by Mr. Heney—"Who if anyone, suggested to you that you make such filing" (referring to your timber filing),

949 and you answered, did you, "Well, the way I came to file, I had a conversation with M. R. Biggs, and he asked me if I had ever used my timber right, and I answered no, and he wanted to know the reason. I told him the ready money; so he told me Dr. Gesner would loan me the money to prove up on a timber claim."

Did you so testify in answer to Mr. Heney's question?

A. How is that?

Q. Did you so testify in answer to Mr. Heney's question at the first trial?

A. I think so.

Q. Now, Mr. Duncan, Counsel has asked you if you had the money at that time to prove up on, and you answered, "No." You meant that you did not have the money without borrowing it?

A. That was what I meant; yes.

Q. If you had had the money without borrowing you would have filed on a timber claim long before, wouldn't you?

A. Well, I don't know as I would.

Q. You don't know as you would?

A. Unless I had plenty of money.

Q. Well, didn't you testify in the first trial that you told Biggs that the reason why you had not filed was because you did not have the ready money?

A. Well we was talking about—he said he supposed that I had used my right on the west side of the Cascades.

Q. Well, didn't you testify in the other trial that you told him that the reason you had not used your right was because you did not have the ready money?

A. I expect I did: yes.

Q. Well, was that true? Was that the reasons why you had not used your right—because you did not have the ready money at that time?

A. Well, if I had had the money to have spared.

950 Q. Yes,—ready money—money that you could spare?

A. Yes,—ready money. I might have taken a timber claim.

Q. Now, at the second trial of this case, in relation to this con-

versation of Biggs, you testified, in answer to Mr. Heney's question, did you not—

"Well, we met there in Prineville, and the way the talk came up after a while he asked me if I had used my timber right. I think that was in a conversation something about timber. He asked me if I had used my timber right. My answer was "No" and he asked me my reason and I stated it was because of the ready money to prove up on."

Now, did you so testify at the other trial—the second trial?

A. Read it over again.

Q. All right.

"Well, we met there in Prineville and the way the talk came up after awhile he asked me if I had used my timber right. I think that was in a conversation something about timber. He asked me if I had used my timber right. My answer was "No" and he asked me my reason and I stated it was because of the ready money to prove up on."

A. That that was the talk came up?

Q. Did you so testify at the second trial?

A. I said I did not remember how the talk came up.

Q. Well, you say that now? You don't remember how it came up?

A. I remember that we was talking there and I don't remember which one first spoke about timber, whether it was myself or him.

Q. Now you don't remember which one first spoke about timber?

A. No.

Q. But some way the talk came up between you there, he mentioned timber, or you did?

Ans. Yes.

Q. Then the question came up as to whether you has used your timber right?

Ans. Yes, sir.

951 Q. And you told him that you had not used your timber right, because you did not have the ready money to prove up on. Now right there, in connection with that, did you testify—you testified as I have asked you, substantially, at the last trial, didn't you?

Mr. HENEY: Well now, that is not the whole of his answer.

Mr. BENNETT: I was just going to ask him the balance of his answer when he answers that question as to whether or not in the same connection he did go on and say these other things.

Q. You testified at the other trial, in substance, as I have asked you, didn't you?

A. It was something near that.

Q. Well, didn't you testify exactly that?

A. I can't just remember the words that I used.

Q. You can't remember? Now, didn't you, in the same connection and as part of the same statement immediately afterwards say that he said if "I wished to locate that Dr. Gesner would loan me

the money to prove up on my timber claim, if I would locate near the old shearing plant in that country somewhere." Did you testify that way in the same connection?

A. That was something near the talk.

Q. Well, did you testify exactly that way?

A. Why, I don't remember every word that I used.

Q. Well, that is all true, isn't it?

A. Yes. It was about the same thing.

Q. About the straight thing. Now, in that same examination at the first trial, weren't you asked this question by Mr. Heney; "Now, just tell the jury all that was said" (Immediately, almost, after the question that I have asked you about the first examination), and did you answer: "As near as I remember what was said he
952 told me that Doctor Van Gesner would loan me the money to prove up on a timber claim. I asked him if there would be any show to sell it later on and he said they would pay $500 a claim for it after I had acquired title."

Did you so testify?

A. Yes sir.

Q. You remember you testified that, word for word, do you?

A. Well, I said yes, sir, about to that same question that was asked me.

Q. Now who do you say went up there with you the day that you went up to Doctor Gesner's place?

A. My wife and two children and a man by the name of Branton.

Q. Where is this man Branton?

A. I don't know. I haven't saw him for quite a while.

Q. How did he come to go up there with you?

A. He was travelling through the country and stopped at the place where I was working over night and the talk came up and I told him I was going out to locate the next day or to look at the timber, and he went along with me.

Q. Concluded he would like to locate a claim too?

A. Why, he said he had started out in that country for that purpose from Lane County, I think.

Q. What say?

A. He said he had come out to that country from Lane County across the mountains.

Q. To take up a timber claim?

A. Well, he had thought some of it, yes; but he had started on his way across to Idaho at that time.

Q. So he went up there with you, did he?

A. Yes sir.

Q. Now, don't you know that the reason why he wouldn't take a claim was because Dr. Gesner wouldn't make any contract to buy it in any way.

953 Mr. HENEY: Are you asking him for conversation that he heard?

Mr. BENNETT: Well, I don't know.

Mr. HENEY: Or how? I will object unless you are asking him for a conversation that he heard between Gesner and Branton.

The COURT: There ought to be something specific. That objection, is, I think, well taken. I suppose it might be asked as to any conversation or statements made.

Mr. BENNETT: I don't know how he knew or whether he knew at all or not.

Mr. HENEY: We don't know whether it is so or not and we don't know how to meet the testimony.

Mr. BENNETT: I don't know whether it is or not. I am trying to find out.

Mr. HENEY: Well, that is not the proper way.

The COURT: You may answer that if you know of your own knowledge. You may state what that knowledge is.

Mr. HENEY: I think the witness ought probably be instructed that his own knowledge means something said by Gesner, because anything said by Branton to him *might* he might think was his own knowledge, and, as a matter of fact, it would be incompetent evidence.

The COURT: I think he understands that. Of your own knowledge derived from the defendant.

Mr. BENNETT: Well, I except to that, your Honor.

A. Why, I don't remember. I heard him talking in the presence of Doc something about the timber proposition, but I don't remember anything that was said. I possibly knowed at the time.

Q. Didn't he ask Dr. Gesner there in your presence if he would make any contract to buy the land of any kind and didn't Dr. Gesner tell him, "No," and didn't he say then, "Well, then, I don't want to take the claim.'

A. I don't remember of it.

Q. You don't remember what was said?

A. No. I don't remember that being.

954 Q. What say?

A. I don't remember anything like that being said there.

Q. Well, do you remember of anything being said between Branton and Gesner?

A. I remember them talking together but I don't remember what was said.

Q. You don't remember about what they said?

A. No.

Q. But you remember they were talking the matter over?

Q. Why, they was talking something about the timber, I presume. There was a conversation there anyway.

Q. Right there in the presence of all of you, eh?

A. Oh, there was several standing around.

Q. That was during the general talk that Dr. Gesner was making?

A. Yes sir; about that time.

Q. Now, who was up there at the sheep shearing plant when you got there?

A. Well, there was Green Beard and his wife, his son-in-law and

his wife—Frank Ray, and Frank Beard and one of the Wakefields. There possibly might have been others there.

Q. Now, after you had the talk with Gesner up there and before you filed on the land, you had another talk with him, didn't you down at Prineville?

A. Yes; we talked some there.

Q. Had a talk about whether he was to loan you the money to make your filings with, didn't you?

A. Yes sir.

Q. Was that before you went to Biggs' office?

A. Yes sir.

Q. And you had a misunderstanding about that,—you and him. You claimed he was to loan you the money and he claimed that he was not to loan you that money; didn't he?

A. No. There was no misunderstanding about that.

Q. Well, there was a misunderstanding between you. He did not understand you like that, about who was to advance the money to make the filing?

A. I think he said at the shearing plant that the parties
955 was to furnish their own filing fees.

Q. Oh, did he say that at the shearing plant?

A. I think so.

Q. That they would have to furnish their own filing fees?

A. Someone had said it to me. I think it was, though. But I don't think I had the money to let go at that time, and I asked him if he could not loan me the money to file on, and he said he couldn't.

Q. That was after you got down to Prineville?

A. Yes sir.

Q. He had told you up there at the shearing plant that the people who filed would have to furnish their own money for filing fees?

A. That was the understanding; yes.

Q. But when you got down there you didn't have the money to spare and a*k*sed him if he could not loan you the money?

A. Yes.

Q. And at first he was not willing to do it?

A. No, he said that he would not do it.

Q. Finally though he agreed that he would?

A. Well, he came and told me to go up to the office and file whenever I got ready; that Biggs would fix that up there.

Q. Didn't he tell you you could give a note for it and he would let you have the money?

A. I think he said something like that.

Q. In pursuance of that understanding you did go up there and give a note?

A. Yes.

Q. For the $2.00 a piece for Biggs fees and also the money for the publication fees, which was $7.50 a piece, wasn't it?

A. Why, I don't remember just what the price was. The note was $19.00 or $19.50 for me and my wife.

Q. $7.50 a piece for publication in the newspapers?

A. I think so.

Q. Now, was not that note given for a year?

956 A. No, I think it was due the first day after date.

Q. Due what?

A. The first day after date, I think it was.

Q. Wasn't it due a year after date? Wasn't all those notes drawn due in a year after date?

A. Well, that was the only one I had anything to do with.

Q. You think that was drawn due the first day after date?

A. I think it was, but I would not say positively.

Q. Now, when you signed that note and made those arrangements there were several of you in there? Were there?

A. In Biggs Office?

Q. Yes.

A. Yes, I think there was four or five persons.

Q. Now, you made arrangements there that you would each be witnesses for the other, didn't you, on the final proof?

A. Yes sir.

Q. Who all was in there at that time?

A. I and my wife and Green Beard and his wife, and I think Frank Ray and his wife.

Q. Was Ben Jone in there?

A. I don't think so; I don't remember of him being there.

Q. You had an arrangement with Ben Jones that you and he were to be witnesses for each other, hadn't you?

A. Talked between ourselves.

Q. Yes. There in Biggs' presence.

A. No, sir, I don't remember of it.

Q. You claim that was not talked over between you and Jones?

A. I don't remember of it, no; I don't remember of seeing him in the office.

Q. But you remember it was talked over that you would be witnesses for each other, whoever was there?

A. I think Biggs said it would be better if our publication was made all at the same time; that we would witness for one another and then all be there together and save trouble.

957 Q. And you all agreed to that, did you?

A. I don't know as I said anything about it particularly.

Q. It was understood there among you, wasn't it?

A. Why, yes, I suppose that was the understanding.

Q. Now, at the time you had the talk with Gesner about the relinquishment, he told you that he could not let you have the money on the way up to the office, did he?

A. On the way down to the office.

Q. Didn't he also tell you at that time on the way down to the office that those that had money to prove up, the ready money of their own, could go ahead and do so?

A. Yes, he said that.

Q. Didn't he tell you in that same conversation that the Government was making a kick about them borrowing money, and that he did not want to have trouble with the Government, whatever they

were, and did not want to have anything to do with what did not comply with the rules of the department, didn't he tell you that?

A. No, I don't recall him saying anything only that he could not let me have the money.

Q. You said you recalled a minute ago his saying that those who had ready money to prove up could go ahead and do so.

A. Yes, I remember that.

Q. That was the same day that he showed you this article in the Oregonian?

A. Yes.

Q. In which Hitchcock said something about people borrowing money to prove up, or people proving up who did not have money of their own, and made complaint about that?

A. It was the same day while we were going to the office that he spoke about that.

Q. When did you see this article in the Oregonian after you read it that day? When did you next see it?

A. I saw it here on the first trial.

—. Did you see it before the first trial, before you were
958 called on the witness stand?

A. Yes.

Q. Before you were called on the witness stand you saw that article; where?

A. In the District Attorney's Office, I think.

Q. Who showed it to you?

A. He did.

Q. Did he tell you that was the same article?

A. No, sir. He asked me if I remember it.

Q. How long was that after you had seen it before? Two or three years, wasn't it?

A. Something like that.

Q. And although you had not read the whole of it, and although it was three years before, you claim to have recognized it?

A. Yes, it read about the same, as near as I could remember.

Q. And you cannot remember whether you read that sworn statement when you were sworn to it, at about the same time?

A. Well, I don't remember.

Q. You don't remember whether you read it over or not?

A. No.

Q. You don't remember whether it was read over to you or not?

A. No.

Q. Although you signed it and was sworn to it?

A. Well, I said I don't remember that at all.

Q. You don't even remember whether you were sworn to it or not?

A. No.

Q. And yet you claimed to have remembered this newspaper article that you read casually three years before it was shown to you again?

A. Yes sir. I know it said something about the entrymen likely to get into trouble, and that is why I remember it.

Q. I thought you remembered it because it said something about sharks?

959 A. Well, I remembered it from the heading of it, and then in reading further down, it said about the same thing about the entrymen, that they would be prosecuted.

Q. You went up and told Biggs you wanted to relinquish, did you?

A. I told him that is what I came for.

Q. And he made up the relinquishment papers for you, and you asked him for the note and got it?

A. Yes sir.

Q. What did you do with the note?

A. I burned it up.

Q. You had been figuring some on getting a timber claim before you had this talk with Biggs, hadn't you?

A. I might have had some thought of it.

Q. Don't you know you had been making inquiries about where you could get a timber claim before that?

A. No sir, I had not made any inquiries in regard to it.

Q. Had you been talking about it?

A. I don't recall of having said anything about it to any one.

Q. There was a great craze all through that country about that time on timber land, wasn't there?

A. Yes, there was a good many people locating in there.

Q. Were there a good many people in the business of locating men on timber claims, Organ and Devine and a lot of other people?

A. Yes, they were up on the Des Chutes river, I think, locating them there.

Q. That was in that same general country?

A. Well, it was on the eastern side of the Cascades.

Q. About how far from this land?

A. I don't know I never was up there, in the timber where they were locating.

Q. At the first trial when being interrogated by me in relation to talking with Biggs, you testified in relation to that matter, "You just happened to meet there? A. Yes. Q. And got to talk-

960 ing about timber claims? A. Yes, sir. Q. And he told you if you wanted to take a timber claim that Dr. Gesner would loan you the money? A. Yes sir. Q. Then as I understood you, you wanted to know something about whether you could sell it or not? A. Yes, sir. Q. And he told you that when you got the land, if you wanted to sell, that Dr. Gesner would give you $500 for it? A. Yes sir. Q. Now, didn't he tell you at the same time that there could not be any contract between you and Gesner in advance in relation to the land? A. I think he said something like that. A. And that you would have the right to sell it to anybody you wanted to, or if you wanted to sell it to Gesner he would give you $500 for it, and he would give you the money to prove up on it? A. Yes sir, and take a mortgage on the land."

Now, did you so testify in answer to those questions?

A. I don't remember. You ask so many questions. If you would ask them in line I could remember.

Q. What say?

A. I don't remember.

Q. You don't remember whether you did or not?

A. I don't remember all the questions you ask.

Q. Oh, you want me to ask you one at a time?

A. Yes.

Q. Was this question asked you: "You just happened to meet there" (referring to the talk with Biggs); did you answer to that "Yes, sir?"

A. Yes sir.

Q. "Q. And got to talking about timber claims" and did you answer "Yes sir?"

A. Yes, I think so.

Q. "Q. And he told you if you wanted to take a timber claim that Dr. Gesner would loan you the money," and did you answer "Yes, sir?"

961 A. Yes.

Q. Now, that was all true was it, down that far?

A. Yes.

Q. "And then as I understood you, you wanted to know something whether you could sell it or not? A. Yes sir. Q. And he told you that when you got the land if you wanted to sell, that Dr. Gesner would give you $500 for it? A. Yes, sir."

Did you answer that way?

A. I don't remember answering that way.

Q. "Now didn't he tell you at the same time that there could not be any contract between you and Gesner in advance in relation to the land?" And did you answer, "I think he said something like that?"

A. Yes sir.

Q. "And that you would have the right to sell it to anybody you wanted to, or if you wanted to sell it to Gesner he would give you $500 for it and he would loan you the money to prove up on it? A. Yes, sir and take a mortgage on the land."

A. I don't remember that question.

Q. Now sir, at that trial you did not testify to anything about what you have said here to-day that he said you could have an understanding, did you, at the first trial? You have put that in this time for the first time, haven't you?

A. I think I said the same thing all the way through.

Q. You think you testified that way at the first trial?

A. That there could be an understanding?

Q. Yes, that he told you, or anything about there being and understanding?

A. Well, I don't recall all the questions, but that is what he told me.

962 Q. Did you testify a thing about that at the first trial or the second trial, or at any time in this Court before this trial?

A. I said he said there could not be no contract made.

Q. But you did not say that he told you that you might have an understanding, or anything of that kind, either in your direct or cross examination *or cross examination* or anything else, did you? At either of the other trials?

A. I don't remember whether I did or not.

Q. Isn't it a fact you have put that in this time for the first time?

A. I don't remember whether it is or not.

Q. Now, in relation to the conversation with Dr. Gesner up at the shearing plant. Didn't you testify at the first trial in answer to the question, "Q. Didn't he tell you in that same conversation the same as Biggs had, that he could not make any contract for it, but that when you got it proved up if you wanted to sell it to him he would be willing to give $500 for it," and did you answer, "I don't just remember the exact conversation we had. Q. Was not that the substance of it, that he could not make any contract with you, nor you could not make any contract with him because that would be unlawful and he did not want to get into any trouble about it. Didn't he tell you that." And did you answer "I think he said something like that."

A. I answered that that way.

Q. What?

A. I think I answered that way.

Q. And that was true?

A. Yes, he said he could not make any contract.

Q. It is true, as you testified there?

A. Yes, he said that.

Q. And right after that was this question asked you, "But that after you got the land and got a patent for it, if you wanted to sell it to him he would give you $500 for it," and did you answer "Yes."

963 A. If I wanted to sell?

Q. Yes, was the question asked you, "But if after you got the land and got a patent for it, if you wanted to sell it to him he would give you $500 for it," and did you answer to that, "Yes?"

A. I don't remember the question being asked that way. It might have been but I didn't understand it if I answered it.

Q. You claim you didn't understand it if you answered it that way. Now, immediately afterwards—if you claim you did not understand that question—were you not asked this question, "Now do you remember whether he said he would give you $500, or it would be worth at least $500 to them or to him," and did you answer "I don't remember which way.?"

A. I remember he said he would give $500 for it.

Q. I am asking you what you testified to at the last trial. I am asking you if this question was asked you, "Now, do you remember whether he said he would give you $500, or it would be worth at least $500 to them or to him," and did you answer, "I don't remember which way."

A. I don't remember all of those questions. There have been a great many questions asked here.

Q. You don't remember whether you answered that way or not?

A. I can't remember all the questions; I made no memorandum of it.

Q. Well, I am asking about that particular one now, and not any other. I mean at the first trial. All these questions refer to the first trial. You understood, did you, that I was referring to our testimony at the first trial?

A. No, I didn't understand it.

Q. Well, I am asking you about the first trial, and the question was asked you, "Now do you remember whether he said he would give you $500, or it would be worth at least $500 to them or to him, and did you answer "I don't remember which way."

A. I remember we was to get $500 a claim for it.

Q. I am asking you what you testified to.

964 A. I told you I didn't remember the question.

Q. That is what I am getting at. You thought I was asking you about the second trial, and I had to ask you over again in relation to the first trial. You don't remember whether you answered that question that way or not at the first trial?

A. No, I don't remember of it.

Q. Now, at that first trial were you asked these questions: "Q. You swore in this paper (referring to your sworn statement that has been offered in evidence) that you had not made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself. You had not made any contract had you, when you swore to that; that was true, was it not?" And did you answer, "Well, he said he would give $500 for the claim. Q. Yes, but you had not made any contract to sell it to him? A. No, I had not contracted to sell it to him."

A. I had not made any contract.

Q. But I am asking you if you so testified?

A. I think I did.

Q. Now, the question immediately afterward being asked you, "Q. You could sell it to whom you pleased; if you could get a thousand dollars from somebody else you could sell it to them? And did you answer "Yes."

Did you answer that question in that way at the first trial?

A. Ask it again.

Q. You have just answered the question "Yes, but you hadn't made any contract to sell it to him. A. No, I hadn't contracted to sell it to him." And then I asked the question, "You could sell it to whom you pleased; if you could get a thousand dollars from somebody else you could sell it to him," and did you answer that "Yes?"

A. I suppose as long as there is no*t* contract made——

965 Q. I am asking you what you testified to. I am asking you if that question was asked and if you answered it "Yes."

A. I don't remember that question being asked me at the time.

Q. Immediately afterward was this question asked you, "You were perfectly at liberty to, and you had not made any contract for the sale of it at all; you simply had an offer from him if you wanted

to sell to him. That was the fact about it, wasn't it"? And did you answer "Yes, sir."?

A. I don't remember the question.

Q. Now, after Dr. Gesner told you that he could not let you have the money to prove up on that land, did you go and make inquiries to see if you could get the money somewhere else to prove up on?

A. No, sir.

Q. You testified at the other trial that you did not remember whether you did or not, didn't you?

A. No sir, I don't think so.

Q. Was not this question asked you; "Didn't you go out and make inquiries on the street there to see if you could get the money from some body else to prove on that land, and did you say "I don't remember"?

A. Well, I don't remember of it.

Q. You mean you don't remember of doing that?

A. No, I didn't.

Q. You did not mean that you did not remember whether you did or did not?

A. I mean that I did not, because I did not remember ever doing it because I hadn't done it; I did not make any inquiries of any one to borrow money.

Q. Then you so testified did you, at the other trial, in that way, in answer to the question I have asked you?

A. I don't know whether I answered just exactly that way.

Q. I believe you have testified in this case now that you don't remember whether it was Biggs who mentioned the matter of
966 timber claims to you first, or you to him.

A. No, I don't remember which way it was.

Q. You would not undertake to say at this length of time just what the exact words were that were used between you and Biggs and Gesner at these different conversations, would you? It has been three years ago.

A. Why, not every word, no, only the outlines of the conversations.

Q. What say?

A. Just the outlines of the conversations.

Q. Have you an accurate memory. Do you remember things very distinctly that happened three years ago?

A. Sometimes I do, some things.

Q. Generally do you?

A. Well, it is owing to whatever it is.

Q. When you swear to a paper is that a thing you are apt to remember?

A. Well it might be owing to the paper.

Q. You don't remember whether you swore to these papers three years ago?

A. No, I don't.

Q. You don't remember whether you read them over or not?

A. No, I don't.

Q. Then you have not a very accurate memory have you?

A. Not in regard to the papers I haven't.

Q. Or as to what happened?

A. Some things that happened I remember.

Q. At the second trial, testifying about the talk with Biggs, you testified that Biggs told you there could not be any contract between you and Gesner in advance in relation to the land. You testified about that didn't you in the other trial? Did you answer "I think I heard something about it; I think he said something like that."

Did you so testify at the second trial? and in that connec-
967 tion you never said a word about his saying anything about an understanding did you?

A. I don't remember the question being asked me.

Q. You were asked time and again to tell everything that took place there between you and Biggs, just what was said between you and Biggs, wasn't you, and asked half a dozen times to do that?

A. Yes sir, but sometimes I didn't remember every word of the conversation that was said.

Q. And now you think you remember that particular thing for the first time at this trial?

A. I didn't know whether the question had ever been asked me or whether I had answered it half a dozen times. I don't remember.

Q. Now, at the second trial, referring back to your testimony at the first trial, was this question asked you: "Q. Immediately after was this question asked you: Now do you remember whether he said he would give you $500, or it would be worth $500 to them or to him? and did you answer, I don't remember which way. And now to that question did you again answer, at the second trial, Well, I don't remember which way it was."

What do you say as to that; did you so answer or do you remember whether you did or did not?

A. I don't remember now.

Q. At the second trial was this question asked you along in that connection: "Q. But don't you remember now which way he did say that, whether he said he would give you $500 or whether he said it would be worth at least $500, and did you answer, Well, he might have said it both ways; I don't remember now;" and then the question being asked you, "Q. You don't remember which way he said it," and did you answer "No, I don't."

Did you answer those questions that way at the second trial?

A. I don't understand exactly.

Q. I am asking you whether these questions were asked you at the second trial: "But don't you remember now which way he did say that, whether he said he would give you $500 or whether
968 he said it would be worth at least $500, "and did you answer, "Well he might have said it both ways; I don't remember now," and then immediately after the question asked, "You don't remember which way he said it," and you answered "No, I don't."

A. Well, I don't remember which way he said it.

Q. You say the same thing now, that you don't remember which way he said it?

A. No, I don't remember just which way it was said, or whether he said it both ways or half a dozen ways.

Q. You know he said there he would give you $500 for it, or it would be worth $500, or something of that kind. Is that what you mean?

A. Yes.

Q. You admit then that you testified that way at the second trial?

A. I don't remember the question being asked me.

Q. Now, at the second trial, being asked about your testimony on the first trial in relation to the matter of whether you had a contract or not, was this question asked you, "Q. No, and you had not made any contract as a matter of fact. You had not said, yes or no in relation to selling the land, had you," and did you answer "No sir?"

A. I don't remember the question.

Q. And immediately afterwards was the question asked you "either oral or written?" and you testified in answer to this question on the last trial, "You could sell it to whom you pleased; if you could get a thousand dollars from somebody else you could sell it to them; and did you answer Yes;" and did you answer to that question on the second trial "Yes sir?"

A. I don't remember that.

Q. Now, immediately after that, referring still to your testimony in the first trial, were you asked this *trial:* "In answer to the question, you were perfectly at liberty to, and you had not made any contract for the sale of it at all; you simply had an offer for it, if you wanted to sell it to him; that was the fact about it. 969 And did you answer "Yes." Now, that being the question, did you answer at the second trial again, "Yes, that was the way I understood."

A. Read it over again.

Q. This being the question, referring back to what you testified at the first trial in answer to the question, "You are perfectly at liberty to, and you had not made any contract for the sale of it at all. You simply had an offer from him if you wanted to sell it to him. That was the fact about it was it? Did you answer Yes sir." This question referring back to your testimony at the first trial; now did you at the second trial answer that question, "Yes sir, that was the way I understood?"

A. I don't remember.

Q. You don't remember that?

A. No.

Q. Now at the second trial on the redirect examination when you were questioned by Mr. Heney again, was not this question asked you, referring to the conversation with Biggs: "Q. About seven or eight weeks ago. Now, at the time you talked with Biggs about making a filing, didn't he figure out for you how much profit there would be in it for you, and didn't you answer, I can't remember now; and then the question being asked you, Didn't he tell you you would

make about $75 clear out of it, and that that would be the best you could do, did you answer, I know he said there would not be much in it if I sold to Gesner. I remember of him saying that, but I don't remember whether he figured up how much there was in it."

Did you so testify in answer to those questions?

A. I don't remember those questions being asked me.

Q. You don't remember answering that?

A. No.

Q. You don't remember a thing in the world about that, about such questions being asked you?

970 A. Well there was so many questions asked.

Q. I say you don't remember a thing in the world about those questions being asked you and you answering that way, and if you did you don't remember a thing about it?

A. No, I can't recollect a thing about it.

Q. How long is that ago, since the second trial?

A. I don't remember that either.

Q. Don't remember that?

A. No sir.

Q. Not more than two or three months was it?

A. No, it wasn't that long I think.

Q. What?

A. I don't think it was that long.

Q. And this conversation with Gesner happened three years ago?

A. Yes.

Q. Now at the last trial being examined by Mr. Heney were you asked this question again in relation to your conversation with Biggs: "Q. Well you have testified as I understood it that Biggs told you that you could not make any contract? A. Yes,sir,he told me that I could not make a contract. Q. Well, now didn't you say in reply that you understood that you were to convey to the doctor? A. Well I thought I would be under obligation. Q. Did you tell that to Biggs? A. No, I don't know as I did. Q. Didn't you tell Biggs that that was your understanding that you had to convey? A. I don't remember now. Q. And didn't he then explain to you that it was all right any way, because you were not bound, not legally bound, that you had not said yes. A. No I don't remember that he said anything in regard to that but that was my understanding of the affidavit."

Did you so testify?

A. I don't remember those questions being asked.

Q. Now at the same trial did you testify on recross examination, "Q. The reasons you were under obligations in the matter, if you did feel under obligations, was not on account of anything

971 you had said, but because you thought it would be kind of mean to borrow money from Dr. Gesner and then sell it to somebody else; that is about the size of it?" And did you answer "Yes sir?"

A. I don't remember that question.

Q. And then immediately afterward the question, "Not because you had ever said you would sell it to him or made any agreement

to sell it to him, but because you thought it was in his range and that it would be kind of a mean thing to borrow the money of him and then go and sell the land to somebody else, especially if he would give you as much money," and did you answer, "Yes that is the way I felt about it."

Did you so answer that question?

A. I don't remember the question being asked.

Mr. BENNETT: There is some question here about the word ranch or range, and I will repeat the question, unless you will agree that the word ranch stands for range?

Mr. HENEY: I will agree to that.

Redirect examination.

By Mr. HENEY:

Q. Were you ever a witness in Court, the Federal court or any court before you were a witness in this Williamson case?

A. No, sir.

Q. Never were on the witness stand before in your life?

A. I was before the Grand Jury in Lane County.

Q. But never on the witness stand before in your life until you were brought as a witness in the Williamson case; is that correct?

A. I was called in a civil case once, years ago.

Q. In answer to these questions put to you on cross examination, leading questions involving two or three questions in one, did you understand them when they were put to you?

A. I don't remember whether I did.

Q. Tell the jury just exactly what your understanding was as to the relations between you and Dr. Gesner in regard to this land at the time you were filing upon it, how you understood it.

972 Explain it.

Mr. BENNETT: I think he has testified fully in relation to that matter. I object to it.

A. I understood he was to loan me the money, and that when I acquired the title I was to turn the land over to him for the sum of $500 and the expenses to come out of the $500, and there would be about $75 in it for me for my claim.

Mr. BENNETT: Of course this is all subject to our objection, Your Honor.

Q. Did you intend to do that at the time you filed?

A. Yes sir.

Q. You said there was no contract. You testified in the other trial that there was no contract. What do you understand by a contract?

A. Written contract.

Q. On the second trial you were asked this question, were you not and did you not make this answer: "Now in the last trial" (referring to the first trial) "you also testified in answer to the question, "you had not made any contract to sell it to him? A. No. Q. You had

not contracted to sell it to him? A. We had no written contract between us, no."

Do you remember that testimony?

A. Yes sir.

Q. And then this question was asked you and you made this answer: "Q. I am asking you what you answered. Didn't you at the other trial in answer to the question, you had not made any contract to sell it to him? A. No. —. You had not contracted to sell it to him? A. I just don't remember the question put in that way but I hadn't signed any contract to sell it to him."

Was that your answer?

A. Yes sir.

Q. What did you mean by that answer?

Mr. BENNETT: I object to that as not proper and not binding upon the defendants.

973 A. I meant that I hadn't signed any contract.

Objection overruled. Defendants except.

Q. This was the cross examination I have read to you, when Mr. Bennett was questioning you himself on the second trial. Then follows what Mr. Bennett read: "Q. And you had not made any contract as a matter of fact; you had not said Ah, yes or no in relation to selling the land, had you? A. No, sir. Q. Either oral or written. And you testified in answer to the question at the last trial, you could sell it to whom you pleased, if you could get one thousand dollars from somebody else you could sell it to them? Did you answer Yes? A. Yes sir. Q. And in answer to the question, You were at perfect liberty to; and you had not made any contract for the sale of it at all; you simply had an offer from him, if you wanted to sell it to him; and that was the fact about it wasn't it? And did you answer Yes? A. Yes that is the way I understood."

Now do you recall that testimony in substance as having been given by you?

A. No.

Q. Now did you understand that unless you had signed a writing, you were not bound to convey to Gesner?

A. How was the question?

Q. Was it your understanding at the time you made this application that you were not bound to convey to Gesner unless you had signed a writing, to that effect?

A. That was my understanding, yes, sir.

Q. And your testimony was given according to your understanding of what it meant?

A. Yes sir, along that line of a contract.

Q. How did you come to go to work for Gesner after you had been a witness before the grand jury? Did you go to him seeking employment, or did he come to you?

974 A. He came to me in Prineville and asked me if I wanted a job of work to make fence for him, or something to that effect.

Q. While you were working for him did you have any conversation with him? Did he come out to where you were at work and have any conversation with you in regard to your testimony in the case?

A. We had talked about it but I don't remember all that was said.

Q. Where was the talk? Where did it take place?

A. Once we was down below the shearing plant, one evening in his pasture.

Q. Was that before you testified at the first trial?

A. Yes.

Q. What was said then; do you remember any of it?

Mr. BENNETT: I suppose this is only offered as against Dr. Gesner?

Mr. HENEY: This is offered for the purpose of explaining insofar as it may have any bearing upon it, the nature of his testimony at the former trials drawn out by the cross examination. If we can we purpose to show that Dr. Gesner endeavored to induce him to testify a certain way.

Mr. BENNETT: Upon that statement of counsel I will withdraw the objection.

Q. What did Dr. Gesner say to you?

A. He asked me if I remembered that this money to prove up on was to be loaned without any interest. I remember of him saying that.

Q. Did he tell you to remember whether he told you what his remembrance or understanding was of what was said up at the timber, or what the agreement was with you?

Mr. BENNETT: How is that question?

Q. Did he say any thing to you about what his recollection was of what his agreement or arrangement with you — at the shearing plant that day with him?

A. Well, that is what he asked me if I remembered him making that statement there?

975 Q. Did he say anything to you further about what his recollection was or what was said up there? Not what did he say, but do you remember whether he did say anything else?

A. I can't recall it if he did.

Q. That was not the whole of the conversation was it, just that one statement?

A. Oh, no, we was there some half hour I presume, talking, but the talk didn't run in that direction all the time.

Q. That was not the only question in regard to that was it?

A. No there was quite a few remarks made by himself and myself, but I don't remember all the questions or remarks that was made.

Q. In the remarks he made did he tell you what his recollection was in regard to the matter?

A. I don't remember that he did.

Q. Do you know an attorney named George Barnes in Prineville?

A. Yes sir.

Q. Is that the same man that was here at the two former trials acting as an attorney in this case?

A. Yes sir.

Q. Did he after you got back to Prineville from the Grand Jury approach you and question you in regard to what you knew about the case?

Objected to as immaterial, incompetent and not in any way connected with this case.

Overruled. Defendants except.

A. Yes sir.

Q. Did he tell you whether or not he was attorney for these people?

A. Yes sir.

Q. During the first trial of this case did Barnes here in Portland while the trial was going on say anything to you about going anywhere with him to meet these defendants before you testi-
976 fied?

Same objection. Objection overruled. Defendants except.

A. Yes sir.

Q. What did he say?

Same objection. Same ruling. Same exception.

A. He said he wanted me to go upstairs in the hotel; that the attorney Mr. Bennett and Mr. Wilson, I believe he said were up there, and he wanted to see them in Mr. Williamson's room.

Q. During the second trial of this case were you up at the hotel in the room of Williamson and Gesner?

A. Yes sir.

Q. Who was there?

A. Well, there was Mr. Williams in the room when I went in and Dr. Gesner came in, and later on Mr. Bennett came in.

Q. What if anything was said by Williamson or by Gesner to you in relation to the witnesses testifying here against them?

A. The remarks Mr. Williamson made?

Q. Yes.

A. He said that some of the witnesses threw it into them; and he said "It seems as if some wild animal was ready to spring on the victim." We, he says, "Them that throwed it into them here would get it throwed back, because they expected to live in that country?

Q. Were any particular ones mentioned?

A. I asked him who it was; he said he would not mention no names; but later on Ben Jones' name was mentioned, and George Gaylord, and Wilford Crane.

Q. Was Mr. Bennett there during that conversation?

A. No, he was not in the room.

977 Whereupon a recess was taken until 2 o'clock p. m. this September 11, 1905.

(By Mr. HENEY: Resuming:)

Q. Mr. Duncan at the time you had the talk with Mr. Biggs in which you stated that you asked him if he supposed you folks were going to be indicted when you were subpœnaed before the grand jury the last time, what did he say in reply?

A. He said he thought perhaps they were going to get a new indictment out against him.

Q. Was anything further said against you?

A. He asked me if I was afraid of getting indicted myself.

Q. What did you say?

A. I told him no, I didn't know that I was.

(By JUROR:)

Q. We can't hear you or understand you.

A. I said no, that I was not afraid in particular of being indicted myself.

Q. After you got here were you threatened with any indictment?

A. No, sir.

Q. How did the country so far as timber is concerned, starting with the old sheep shearing plant, going east and north from there compare with reference to the timber as to the quality of it, with what it is right around the sheep shearing plant?

A. Well I think the growth gets heavier on the north and east.

Q. Going north do you go up into a higher country?

A. No, no, it is over a ridge down onto a stream.

Q. And then from there?

A. Going still farther north?

Q. Yes.

A. That goes over onto the Ochico.

Q. That is where these timber claims were being taken up. Is the Ochico higher than where it is at the sheep shearing plant or not?

A. No, the sheep shearing plant is on the divide or ridge or spur of the mountain, and the Ochico comes down a canyon on
978 the other side, and I presume it would be on lower ground.

Q. Where did you find the heaviest timber in that section? On the high ground or lower ground?

A. Well, it is generally on the flats, I think, the best timber.

Q. Where the streams are?

A. Near the streams.

Q. Did you ever try to locate anybody on this piece you and your wife relinquished?

A. Yes.

Q. Did you succeed?

A. No, sir.

Q. Why not?

Objected to as immaterial and incompetent.

The COURT: You can ask him why he could not.

Defendants except.

Q. Do you know why you could not get anybody to locate on it?

Objected to as immaterial and incompetent.
Objection overruled. Defendants except.

A. No.
Q. What was the character of the timber upon it as compared — that in the vicinity where you had located people?
A. Well, it was not as good.

(JUROR:)

Q. What was that answer?
A. No, it was not as good timber.
Q. Did you locate anybody in that section of the country, among those locators?
A. You mean in the same township?
Q. Yes.
A. Yes, there was two that I located in the same range, Range 19, Section 24.
Q. Was that township 15?
979 A. Yes, sir.
Q. How was the timber there compared with what you had filed on?
A. It was better timber.
Q. Twenty four is over here at the line of the next township 20?
A. Yes, sir.
Q. You say there were two. Where was the other one; in the same section?
A. Yes, I located, since I come to think about it, three, but one of them laid scrip on one quarter.
Q. Where was that?
A. The southwest quarter.
Q. On that same section?
A. Yes, sir, the southwest, the northwest and the southeast.
Q. Mr. Bennett asked you if you had testified before at either of the other trials that you did have an understanding with Dr. Gesner, but no contract. I think he told you that you never had. I will ask you if on the second trial you did not testify this way in answer to these questions: "Q. At the time you were talking with Biggs didn't he say to you that Gesner would furnish the money provided you would sell it to him when you got title, for the $500? A. I don't remember now just the words that was used. Q. Well didn't he say that in substance? A. How is the question? Q. That Gesner would furnish the money for you and your wife to prove up, provided when you got title you would both convey to Gesner for $500 a claim? A. I don't remember now. Q. You don't remember? A. No. Q. Wasn't that your understanding of it at the time you started up to the timber? Objected to. Question withdrawn. Q. Wasn't that your intention at the time you started up to the timber? A. Yes, sir. Q. And that was your intention at the time you filed? A. Yes."
Do you remember so testifying or that in substance?
—. ——.

Q. Now then following that didn't you testify this way: "Q. Well now did you understand at the time you were signing the
980 paper" (referring to that application) "that the contract that it referred to had to be in writing—this filing paper? A. How was the question? Q. At the time you were making this filing—it refers to a contract—it says that I do not apply to purchase the land above described on speculation but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself. Now, did you understand from that that the contract referred to there had to be in writing? A. Of course I thought that—of course there was an understanding that he would give me $500 for my place; but as I didn't speak, say yes or no, I didn't think that I had made an agreement to sell it. That is the way I understood it at that time."

Do you remember testifying to that?

A. Yes, sir.

Q. And then following that these questions: "Q. That you didn't make any answer and therefore it wasn't an agreement? A. That there was no contract made. Q. But you did form the intention at the time that you would convey as soon as you got it? Did you? A. Well, I supposed I would be under obligation to sell to him? Q. Why? A. Well he had a mortgage on the place. Q. When Biggs told you that Gesner would furnish the money and would pay $500, what did you say to Biggs in reply to that? A. I didn't understand all the question. Q. Did you say that you and your wife would go up the next day and file? A. I think I told him that I would go. Q. Did Biggs tell you that that did not amount to a contract, because you hadn't said Yes at the time you were filing—making your filing? A. I don't remember what he said in regard to it, or whether he said anything or not. Q. Well you have testified as I understand it, that Biggs told you that you couldn't make a contract. Q. Well, now didn't you say in reply that you understood that you were
981 to convey to the Doctor? A. Well I thought that I would be under obligations. Q. Did you tell that to Biggs? A. No, I don't know as I did. Q. Didn't you tell Biggs that that was your understanding, that you had to convey? A. I don't remember now. Q. And didn't he then explain to you that it was all right anyhow, because you were not bound—not legally bound—that you hadn't said yes? A. No, I don't remember that he said anything in regard to that, but that was my understanding of the matter."

Do you remember testifying so in substance?

A. Yes sir.

Q. Did Mr. Biggs say anything in any of these talks you had with him about the drawing up of a contract, or as to what would constitute a contract, or what you could do?

A. Who was that?

Q. Biggs.

A. He said he could not draw up any contract or could not make any contract, or something like that.

Q. Did he say what you could do?

A. He said *he* could understand one another.

Q. Was there any talk between you and Biggs as to whether Gesner might not go back on that understanding?

A. I don't remember now.

Q. I show you a photograph marked No. 24. Can you recognize the place in that photograph?

A. Yes.

Q. What place is it known as?

A. The Pollard place.

Q. Is it on a creek?

A. On Horse Heaven Creek.

Q. Do you know about where? Do you know where Little Horse Heaven is?

A. Yes?

Q. Is this anywhere near where Little Horse Heaven branches off?

982 A. Yes, just below, where it comes into the main creek.

Q. Is it on the main creek or on Little Horse Heaven?

A. The Pollard place?

Q. Yes.

A. It is on the main creek just below.

Mr. HENEY: We will ask to have the photograph asked for identification merely.

Recross-examination.

By Mr. BENNETT:

Q. Mr. Duncan as I understand you out of the 20 claims you located in there three of them were in this township?

A. Yes.

Q. The balance of them were in the township adjoining?

A. No they was above. I located some in the township above, one or two claims, and then they were in the second township above.

Q. Speak louder.

A. I say I think I located two claims in the township above, and the rest of them was in the township still above that.

Q. Six miles from this township or cornering with this township?

A. I located two claims right along the range line, between this township and the range above; and the rest of the claims was located in a range still above that range.

Q. These three claims you have testified about, what township were they in?

A. In township 15, Range 19.

Q. Then you located some in 15-20?

A. Two, I think.

Q. And the balance of the — in 15-21?

A. Yes.

Q. Now the timber as you go farther up got better, did it?
A. Yes, as a rule.
Q. On the average as a rule.
A. Yes.
983 Q. And farther away from market, didn't it?
A. Yes.
Q. Farther away from market and somewhat better in quality as a rule?
A. Yes, sir.
Q. This timber was about the closest good timber there was to Prineville, wasn't it?
A. In that direction it was, yes.
Q. There wasn't any any closer in any direction, was there?
A. I think there was some as close, in another direction.
Q. In another direction.
A. Yes.
Q. But none closer?
A. No.
Q. None as close in that direction?
A. No.
Q. The timber on these claims of yours was good enough so that you went up and tried to locate people on them afterwards?
A. Yes sir.
Q. The people that you took up there and tried to locate, did you locate them somewhere else, or did they locate at all?
A. They located above. I tried one man there.
Q. They liked something else better?
A. Yes.
Q. At the first trial of this case you never said a word about a written contract at all, did you?
A. I don't remember as to that.
Q. At the second trial you commenced to talk about a written contract.
Mr. HENEY: You better show that he did not in the first trial.
Q. But now you have gotten up to the point of thinking that when you said there was no contract whatever, that you did not say yes or no, you have gotten to the point of thinking that you meant a written contract.

984 Objected to upon the ground that it is assuming that the witness testified differently at another time, and there is no evidence that he ever did testify differently.
The COURT: Let him answer and then make such explanation as he pleases to make?

A. Yes sir, that is what I thought, that is had to be a written contract.
Q. Mr. Duncan, in relation to the talk you had with Dr. Gesner, that was when you were building fence, was it?
A. That was while I was up there working on the fence.
Q. He was frequently up there to see about the fence wasn't he, while you were working there?

A. Well, he came there a good many times to the place.

Q. At this time you and he got into a talk and talked about half hour as I understand it.

A. I think something like that; I think it was about half an hour.

Q. You were not talking about the case all the time, as I understand you, but talking about different things?

A. No, we talked about different things.

Q. But some part of the time you were talking about the case?

A. Yes, it was mentioned there.

Q. You don't remember how long?

A. No.

Q. And during that conversation Dr. Gesner asked you if you remembered about the arrangement about the grass?

A. Yes.

Q. And you told him in substance that you had some memory of it but not a very clear one, didn't you?

A. I told him I had heard it mentioned but I didn't know when it was. I had heard some one speak of it.

Q. You didn't know whether it was then or some other time?

A. No.

Q. And in that conversation you testified in the other trial
985 that the way it came up, that something was — about that he thought it was a political persecution against Williamson, didn't you?

A. Yes sir.

Q. There was some talk about that wasn't there?

A. Well he spoke that, yes.

Q. In that same conversation didn't he say to you that all he wanted was the truth, and that if everybody went down there and told the truth they could not or would not hurt him? Didn't he say that or something to that effect?

A. I don't remember now.

Q. You don't remember whether he did or not?

A. No.

Q. Have you told everything of that conversation that you can remember?

A. In regard to the talk about the trial?

Q. Yes, about the case.

A. Oh, I might think of more.

Q. What was it that was said there if anything more?

A. Why he was telling me that the Oregonian had it in for Williamson.

Q. Anything else?

A. Well, he said Scott, I think the editor of the paper, had threatened Williamson if he did not vote for——

Q. Scott for the Senate?

A. Yes, I think it was; that is, some one had——

Q. That he had threatened Williamson, if Williamson would not vote for Scott for the Senate. Anything more?

A. I think he said he would snow him under or dig his grave or something another.

Q. What was it?

A. If this fellow—it was not Scott that said it, but some fellow that was interested in the Oregonian some way or other.

986 Q. Somebody that was interested in the Oregonian had said they would dig Williamson's grave or snow him under?

A. Did his political grave or snow him under or something like that, if he didn't vote for Scott for Senator.

Q. Anything else?

A. Why, he said Williamson told this gentleman, whoever it was, that he would go to Congress in spite of hell for two years, in spite of him and the Oregonian.

Q. Anything else?

A. That is all I remember he said.

Q. That is all the conversation you remember is *ti?*

A. I remember that much of it.

Q. That is all you remember that was said about the case, what you have told; the different things you have told us is all you remember that was said in that conversation that had reference to the case?

A. I don't know; there might have been somthing else said.

Q. If there was anything else tell it. If you claim there was anything else, tell it.

A. Well, there was nothing else said just like that.

Q. Was there anything else that had any bearing or reference in this case that you remember of?

A. Nothing that I think amounted to anything.

Q. You have told everything you can think of, have you?

A. I think so.

Q. Now, coming down to the time when you say that Mr. Barnes told you that we would like to talk to you, the attorneys for the defendants would like to talk to you, when was that and where?

A. That was just before the first trial.

Q. Did you go up?

A. No, I was on my road then or was called up to Mr. Neuhausen's room or residence.

Q. You went to see Mr. Neuhausen but you did not go up to see us before the first trial at all, did you?

987 A. No sir.

Q. You went up and told Mr. Neuhausen all you knew about the case?

A. No.

Q. Talked with him perfectly freely and answered everything he asked you, didn't you?

A. No sir.

Q. What say?

A. No, I don't remember what was said up there. There was quite a number of the witnesses called up there.

Q. You answered all the questions Neuhausen asked you, didn't you?

A. I presume I did if he asked me any.

Q. You did not come to see us at all before the first trial, did you?

A. No sir.
Q. Not at all?
A. No sir.
Q. You didn't talk with us or any of us when you gave the first testimony on the first trial?
A. No, I didn't talk to you.
Q. Nor any of us down here, the defendants, or any of them? after you came down. The only talk you had with any of them was the one you told about Dr. Gesner?
A. Up there.
Q. Yes. Now Mr. Barnes told you that we would like to know what your testimony would be in the cases, didn't he?
A. I think that was what he said.
Q. And you never came up to tell us or to let us know at all? Were you told by Mr. Neuhausen or by Mr. Burns not to talk with us about the case or tell us what you knew?
A. He said I could do as I pleased about it?
Q. Didn't he tell you that you had better not?
A. He said they might throw me into an embarrassing position if I did.
Q. Didn't he tell you that you had better not?
988 A. He said I could do as I pleased.
Q. Didn't he tell you that you had better not?
A. I don't remember him saying that.
Q. When was it you came up to Mr. Williamson's rooms and had the talk that you have testified about? That was after you had testified on the second trial, wasn't it?
A. Yes.
Q. You never did come up in his rooms until after you testified at the second trial, did you?
A. Yes, I had been in his room once before.
Q. But you had no talk up there about the case at all, had you?
A. I don't think so.
Q. You just went up there on business?
A. Yes sir.
Q. So that you had had no talk with any of us about the case up to the time you testified on the second trial, except what you have already told?
A. Why we might have said something about it on the first visit there, but nothing that amounted to anything, I think.
Q. Just mentioned it?
A. Yes.
Q. When you went up there between the first and second trial, that was after the first trial, and before the jury was discharged wasn't it?
A. I don't know whether it was while the jury was out or while the trial was going on; I don't remember.
Q. It was after you had testified?
A. Yes.

Q. And you did not know that you would ever be called upon to testify again in the case?

A. No, I didn't know that I would.

Q. You had testified altogether and either the case was concluded and to the jury, or else it was going on with the other witnesses, and if you had any talk at that time it was simply some casual remark? You went up there on business?

989 A. Yes sir.

Q. Now after the second trial when you went up there the jury was out then, wasn't it, when you had this talk?

A. No, I think the trial was going on.

Q. You think the trial was going on?

A. I think so.

Q. Was not the testimony all in?

A. I don't remember as to that.

Q. You don't remember whether it was or not?

A. No.

Q. Anyway you had testified?

A. Yes.

Q. You had got all through with your testimony?

A. Yes sir.

Q. Then you went up there upon your own motion on a little business matter?

A. Yes sir.

Q. To collect a debt they owed you, as a matter of fact?

A. Yes.

Q. To get some money that was due you on the contract you testified about?

A. Yes sir.

Q. And while you were up there the subject of the testimony that had been given in the case came up, something like that?

A. Yes, they was talking about it.

Q. You say I was not there at the time that talk occurred?

A. No, you was not in the room. You came in the room but you went out again.

Q. Do you mean that any part of this talk you have related occurred while I was in the room?

A. I don't remember whether you were in the room any of the time or not. You came in but you wasn't in all the time that I was there.

990 Q. Were the other persons there in and about the room?

A. Williamson was in the room and Dr. Gesner.

Q. Williamson had two rooms, hadn't he?

A. Yes sir, there was some other persons in another room. You had gone back in the room.

Q. What say?

A. You were in the back room.

Q. Talking to some other persons?

A. Yes sir.

Q. How long was I in the room where you were while I was there?

A. I presume about a minute.

Q. And then I went back where the other people were. Do you claim that was before or after you had this talk that I stepped in there for a minute as you say?

A. I believe it was after; I ain't certain.

Q. Were the other persons beside myself going back and forth from one room to another?

A. There was no one came in the room while I was there but yourself and Dr. Gesner. Williamson was already in the room when I went there.

Q. Was Mr. Wilson there?

A. He was not in that room while I was there.

Q. Was he in the other room?

A. Yes sir, I saw him through the door while the door was open.

Q. Mr. Williamson seemed to be pretty indignant about the way some of the witnesses had testified in the case, did he?

A. He did not seem to be terribly put out about it.

Q. What was it he said? Who was it he said acted like wild animals? Did he say the witnesses acted like wild animals or acted like he was a wild animal?

A. Why, he said they seemed to him like some wild animal ready to spring on their victim.

Q. Who was? The witnesses or he was?

A. The witnesses.

991 Q. It seemed to him as though the witnesses were like some wild animal?

A. Yes, some of them; he did not say they were all that way.

Q. Who do you claim was present just at that time?

A. Just the three; Dr. Gesner, Williamson and myself.

Q. Yourself, Williamson and Gesner?

A. Yes.

Q. And you claim Williamson said in effect that they testified falsely,—some of the witnesses?

A. No, he did not exactly say that.

Q. That was the way you understood it, wasn't it?

A. Well it seemed like the way he spoke some of the witnesses had it in for him.

Q. He thought they testified falsely, didn't he, and didn't he say that?

Q. Well, he said it seemed as if they were like some wild animal ready to spring on a victim.

Q. Didn't he say in so many words that their testimony was false was not true?

A. No, I don't remember of him saying that.

Q. You claim the way he put it was that they threw it into him?

A. Yes.

Q. You admit he said that?

A. Yes.

Q. You say there was no names mentioned at that time?

A. No.

Q. But later on he was talking about Ben Jones, Gaylord and Wilford Crane, was he?

A. Yes.

Q. And he seemed to think they had testified falsely, didn't he?

A. Oh, I took it that way, yes.

Q. You have told everything that took place up there, haven't you as near as you can remember?

A. No sir.

992 Q. What say?

A. No sir.

Q. All right, go ahead.

A. We was talking about a matter of business part of the time.

Q. I mean everything in relation to this case.

A. No, you talked some about the case.

Q. What did I say?

A. You asked me what was the matter with Ben Jones.

Q. And I claimed he had been testifying falsely or that it looked to me like he had been testifying falsely?

A. You asked me what was the matter with him. I said maybe he was mad at you; and you said no, he could not have been mad at you because he commenced right on the start.

Q. Was there anything else?

A. I presume there was other things said but I don't remember what they were.

Q. If you remember anything else that was said about the case tell it.

A. That is about all you said about it.

Q. Have you told everything that was said there about the case?

A. About all I remember now.

Second redirect examination:

Q. When you were testifying on the first trial, didn't Mr. Bennett try to get you to admit that you had made different statements as to some of these things in Prineville to Barnes before coming down here?

Objected to as immaterial.

Objection overruled. Defendants except.

A. What is the question?

Q. Did not Mr. Bennett ask you this question upon the first trial: "Now state whether or not on or about March 19, 1905, standing in front of the bar at Smith and Click's saloon in Prineville, Smith and Click and yourself being present and Mr. George Barnes, Barnes asked you if you had made any contract before you filed,

993 with either Williamson and Gesner, or with Gesner or with Biggs—any contract for the sale of the land, and did you not in answer to that say No, you swore to the truth (referring to the time when you made this affidavit that has been offered in evidence)?"

Didn't he ask you that question on the first trial?

Objected to as immaterial and incompetent.

Objection overruled. Defendants except.

A. Yes sir.

Q. Then didn't he ask you this question; "Now didn't you in the presence of those persons, in front of the bar say in answer to his question to which I have already referred, No, I swore to the truth."

Do you remember that?

A. No, I don't remember that question.

Q. Then didn't he say, "You deny that, do you?" And then didn't he say, "In the same conversation, in the same presence, didn't Eisen Click ask you if you ever made any contract for the sale of the land at any time, and didn't you answer "no?"

Do you remember those questions?

A. I remember those questions, the last one.

Q. Now up in this talk in the room with Williamson and Gesner did Williamson say that Gaylord and Crane and Jones testified falsely?

A. Well, I don't remember as he just said that they swore falsely, but from his conversation and what he did say, led me to believe that he thought they did.

Q. Either that, or that they had hurt him; was that it ? that the testimony had hurt him?

Objected to as leading and putting words in the mouth of the witness.

Q. Wasn't it open to that inference just as such as the other?

Objected to as not proper re-examination.

The COURT: Let him testify as to what was said.

994 Q. When you were subpœnaed for the first trial Mr. Duncan did you run away from the officer when you saw him coming with the subpœna?

Mr. BENNETT: I object to that as immaterial and incompetent.

Overruled. Defendants except.

A. What was the question?

Q. Didn't you run away from the officer when you saw him coming with a subpœna for you the first time?

A. Yes sir.

Q. How far did he have to run to catch you?

Same objection.

Objection overruled. Defendants except.

A. He did not catch me at that time; I came in afterwards.

2nd recross-examination:

Q. There wasn't any of the defendants around there at the time?

A. I didn't see any of them.

Q. Now then, at the other trial immediately after the questions were asked you by Mr. Heney just now were you not asked this question: "Now afterwards, and on April 6, 1905, standing on the side walk in front of the Japanese bazaar in Prineville, you and Barnes and M. E. Brink and William Combs being present, didn't you in answer to the same question, in substance, make exactly the same

statement: that is, that you had not made any contract and that what you swore in your affidavit was true? A. There, right our near the Japanese bazaar, Barnes and M. E. Brink said they wanted to talk to me and they asked me, I remember, two questions, is all I remember of. They asked me if I had made a contract with them to sell the place and I said No. Q. You said No? A. Yes."

Did you so answer these questions?

A. I think I did.

Q. You admit you had that talk with them?

A. Yes sir.

995 3rd redirect examination:

Q. On your redirect examination at the first trial were not these questions asked you and didn't you make these answers: "Q. What did you mean by saying that in this talk with Brink and Barnes you told them you had made no contract? A. Well, I hadn't at that time made any contract. Q. To sell the land? A. Well, I hadn't at that time made any contract, when I relinquished. Q. What do you mean, in writing? A. Yes, sir. Mr. BENNETT: I object to that as leading. Mr. HENEY: I think I am entitled to lead this witness a little bit. The COURT: Ask him the leading question. Q. You understood perfectly didn't you that you were to convey this land to Gesner as soon as you got the title to it? A. Yes sir. Q. And you understood the mortgage was just temporary, for the purpose of keeping out of trouble with the government? Didn't Van Gesner say that out there at the sheep ranch? Objected to. Q. Didn't Van Gesner say out at the sheep ranch, that he would deposit the final proof money for each person filing, in the First National Bank of Prineville, Oregon, to be drawn by them as a loan on the day of their final proofs, and that he wished each person to give him a mortgage to be drawn for a period of from 30 to 90 days, and for a time long enough for the claims to be deeded over to him for $500 each? A. I think that was the conversation. Q. When did you go to Van Gesner this last time? A. I think it was in May."

Do you remember those questions and answers?

A. Yes sir.

Excused.

996 CAMPBELL DUNCAN recalled on part of the Government.

Direct examination.

By Mr. HENEY:

Q. Mr. Duncan when you first saw Clarence Branton at the Adams ranch—that is where you were working wasn't it?

A. Yes.

Q. When you first saw Clarence Branton there, what did he tell you, if anything, as to where he was going?

A. He said he was going to Idaho.

Mr. BENNETT: I object to that as not proper rebuttal. I think he also testified to this when he was on the stand before.

Mr. HENEY: I don't remember whether he testified to this or not.

(By the COURT:)

Q. Do you recall testifying on that subject.
A. I don't remember of it.

Objection overruled, defendants except.

Q. What did he say?
A. He said he was going to Idaho, on his road there.
Q. Did you hear a conversation between Branton and Gesner up in the timber, and if so, state what it was that you heard Branton say and what you heard Gesner say.

Objected to as not proper rebuttal.
Mr. HENEY: Well, I will direct his attention to the testimony.

Q. Did you tell Branton in the talk the night before going up there, that there might be a chance to make more than seventy-five dollars out of the claim?
A. No, I don't think I ever did.
Q. Now, did Branton insist upon Dr. Gesner telling him more particulars about taking up the claims?
997 A. Yes, he seemed——

Mr. BENNETT: We object to that as not proper rebuttal.
Mr. HENEY: He was asked a question "You were very insistent upon knowing how much there was going to be in it, was you not" and his answer was, "I was not particularly insistent." Now, the question is, to this witness, was not Branton very insistent upon knowing from Dr. Gesner how much there was going to be in it for him?
Mr. BENNETT: I submit that is not put in the words of the original question, "Didn't you insist on knowing whether he would give you a positive agreement?"
Mr. HENEY: That is not the place, Judge. I am reading ahead of that.
Mr. BENNETT: I see. Well, that is all right then.

Q. Now, the question is, was not Branton very insistent upon knowing of Dr. Gesner how much there was going to be in it for him (Branton).
A. Yes.
Q. Now, did no- this conversation take place between Branton and Dr. Gesner: Did not Branton insist on knowing whether Gesner would give him a positive agreement to pay the $500, put up the money and pay the $500, and pay the difference as soon as he got the final receipt?
A. Yes, sir.
Q. Did not Branton ask the Doctor if he would put it in writing, and did not the Doctor say to that, "No?"
A. Yes he asked me if he would make a contract.
Q. And didn't he say he would not put it in writing, but he would buy the land and pay him the $500?

Objected to as not proper rebuttal and not being any question that was asked of the witness.

Q. The question was, "Didn't he say that he could not put it in writing, but that he would take it." Now, didn't Dr. Gesner say that?

998 A. Yes sir.

Mr. HENEY: I think we have a right to have this witness state just what the conversation was between Branton and Gesner on the subject.

Mr. BENNETT: He has already told that once.

Objection sustained.

Q. Now, in that conversation did not Dr. Gesner say to Branton that he could not draw up any contract because that would get him into trouble with the Government, but that he would take the claim and give $500 as soon as Branton had the title?

A. Yes.

Q. Then, did not Branton or some one there say something about the homestead law, and did not Branton use this language in substance, talking to Dr. Gesner: "It is just like this, the whole damn thing is a lie from beginning to end any way. Who the hell would take a homestead unless he could get something out of it?"

A. Yes sir.

Q. Did you have a talk with Branton in Prineville in the year 1903 about a year after you had been up to the timber?

A. Yes sir.

Q. And in that talk did Branton tell you that the reason he did not take up a claim was because there wasn't enough in it?

A. Yes sir.

Mr. BENNETT: We object to that, no sufficient foundation laid for impeaching, time place and person present were not called to the attention of the witness.

The witness answered the question before I had time to get in the objection, and I desire to move to strike out the answer.

Mr. HENEY: This question was asked of the witness Branton, and there was no objection made on the ground that the question was not particular enough.

Mr. BENNETT: That is not a proper time to make an objection of that kind. What I want to call your Honor's attention to is that there is nothing in the question in regard to persons present.

999 One of the important things in an impeaching question is to call the attention of the witness sought to be impeached to the time, place and persons present, for the purpose of identifying the occasion to the witness. It was not for us to object at that time. We did not know whether they were going to call anybody to impeach him.

Objection overruled. Defendants except.

Mr. HENEY: The answer was already in, your Honor, and there was a motion to strike the answer out.

Mr. BENNETT: Yes, I objected to the question, and moved to strike out the answer on the ground that no proper or sufficient foundation was laid for impeaching the witness, and that time and place were not sufficiently definitely pointed out to him, and no indication

to him in any way as to what, if any persons were present at the time the conversation claimed to have occurred.

Motion overruled. Defendants except.

Q. Was it about a year after you were up in the timber, as near as you can fix the time of the conversation?

A. Why I think it was in May. We were up there in June, and I think it was the next May if I remember right.

Q. Did Dr. Gesner in that conversation, state to Branton that he could buy the claims, that he could not make a contract at all?

A. Yes, he said he could not make no contract.

Q. Did he say he could not buy the claims at all?

A. At no time?

Q. Yes.

A. I never heard him.

Mr. HENEY: If your Honor pleases, before taking the recess, I would like to call attention to one matter, I would like to take the Crain and Gaylord checks during the noon hour if I may withdraw them.

Mr. BENNETT: I do not like to object, but I don't like to have them go out into the hands of irresponsible parties. I am
1000 willing Mr. Heney should take them if he will keep them in his possession.

Mr. HENEY: They are not going into the hands of irresponsible parties; I will be responsible for them, I will say frankly, and I want to have a test made as to whether the figures 11 and 9 were put on the checks at the same time the balance of the checks was written.

* * * * * * *

The COURT: I will make an order that the marshal is authorized to take the checks and retain them in his possession delivering them to such person or persons as the District Attorney desires to make a test of them in any way he pleases; the Marshal to be accompanied always by any person who may be designated by the defendants or their counsel.

Whereupon a recess was taken until two o'clock P. M., this 22nd day of September.

Mr. HENEY: In regard to the matter of making a test of these checks, your Honor, while I do not consider it very material, there is a lady in the city who has had a great deal of experience in that sort of test work, and I wanted to have her test them. But before they are cut any more—one of them has already been cut a little, as we agreed upon before lunch—Judge Bennett wants the jury to see the checks.

Mr. BENNETT: I want to present the matter to the Court. It turned out that the expert could not tell anything about it, she said, without putting the check through a process which would destroy entirely that part which was used by her. Now, as your Honor knows, the contention Mr. Heney makes is in regard to the figures

11 on one check and the figure 9 in the other; and that unfortunate blot which *for* on the figures 11 while in the hands of the stenographer, has covered up one of the figures almost entirely, leaving only one figure 1 for the test, and of course, on the other is only the figure 9. We feel as though the jury are the ultimate judges in relation to this matter, and we do not feel that it is safe
1001 to *is* to have them mutilated any further.

Mr. HENEY: The Government does not make any contention but what the 9 and the 11 look exactly as if they were put on the checks at the same time the remainder of the check was written. It has every appearance of having been written at the same time, but we want to satisfy ourselves, in view of the fact that Crain and Gaylord are so positive about having received the checks on the same day, that conversation took place in Gesner's office, which date was fixed as December 8th. The theory on which I do that is that the check might have had the date blank and might have been cashed in some store and gone into the bank the next day and thereby received the stamp "Paid" on the 9th and the other might not have been turned in until the 11th.

Mr. BENNETT: We have no objection to any test that can be made without destroying the matter in question.

Mr. HENEY: The Chemist only wants to take about half of the lower end of the 9, and that would leave the whole of the upper end, and then for comparison, a part of the word nineteen.

The COURT: I see no objection to doing it. I would allow any test of that kind to either side.

Mr. BENNETT: If it may stand as conceded in this case, and at any other time, that this may become material, that upon the face of it this appears to be at -his time the same ink and written as the same time, so far as anyone examining it without a test, is concerned, why then I don't care if you take the top of that figure.

Mr. HENEY: I frankly concede that it so appears to me to be the same.

Mr. BENNETT: That there is no indication of any obliteration or anything of that kind?

Mr. HENEY: No indication or any obliteration or evidence of their having been put on a different time. There is nothing suspicious about the appearance of the check on its face at all.
1002 Is that broad enough for you?

Mr. BENNETT: That is broad enough.

Mr. HENEY: And that may go for all time. You don't object now, Judge, to her using this other check, with the same admission?

Mr. BENNETT: No, I don't care.

Mr. HENEY: Very well. Then you may take both checks, Dr. Hampton.

Direct examination of DUNCAN resumed:

Q. You testified when you were on the stand before that you did not remember the conversation between Branton and Gesner, up there, didn't you?

A. Yes, I didn't remember it at that time.
Q. When did you first remember it after that?
A. Right after I left the stand.
Q. With whom were you talking about it after you left the stand?
A. I think I was talking with you.
Q. What were my questions directed towards—the first question?
Objected to and question withdrawn.

Cross-examination.

By Mr. BENNETT:

Q. Mr. Duncan, whereabouts in Idaho do you claim that Branton was going?
A. He never told me where he was going, only to Idaho.
Q. What say?
A. He never said any certain place, only to Idaho. Said he was on his road to Idaho.
Q. Did he tell you he was going up in the country about Vale, Malheur County?
A. No, sir.
Q. That is right across from the Idaho line, isn't it?
A. I don't know where it is.
Q. When is that you claim that Branton made these state-
1003 ments that you have given so much in detail in answer to Mr. Heney's question?
A. Which statement?
Q. The statement between him and Dr. Gesner.
A. Where was that at?
Q. Yes.
A. Up at the shearing plant.
Q. Who was present?
A. There was several parties standing around.
Q. Was that the time you testified about in your direct examination when Dr. Gesner made the talk?
A. Yes, sir.
Q. Immediately after that talk, the parties all separated, did they not, and Dr. Gesner told you where you could find a claim to look at, and you went one way and the other parties went another way?
A. Yes, sir.
Q. That is the only talk you claim to have heard in which Branton took any part, when you were there al- together?
A. Was the talk there at the shearing plant, yes, sir.
Q. When Dr. Gesner was making his talk to the people, is that right?
A. Well, that is all I heard them talk al- together, was right there.
Q. In your direct examination in this case at this trial, you were asked by Mr. Heney this question, weren't you? 'Q. What did Gesner say?" Referring to that time—and did you answer, "Why, he said he would loan us, I think it was $450 or $475 when we proved up, and give him a mortgage on the land for thirty or sixty or ninety days, something like that, and when we was ready to turn it

over, he would pay the balance, the remainder of the $500 for the deed. Q. Was there anything said to your folks in reply to that? A. I don't remember anything?"

Did you so answer to questions by Mr. Heney?

1004 A. Well, I didn't say anything.

Q. You did not?

A. No.

Q. Now, in your cross examination, was that matter directly called to your attention, you having stated that in relation to Branton, "Well, he had thought some of it, but he had started on his way across to Idaho at that time," the question being immediately asked you, "So he went up there with you, did he?" and you answering, "Yes, sir." And immediately after was this question asked you, "Now don't you know that the reason why he would not take a claim was because Dr. Gesner would not make any contract to buy it in that way?" and then after some colloquy between Mr. Heney and myself, and the court saying, "I think he understands that; of your own knowledge derived from the defendant," did you answer, "Why, I don't remember, I heard him (referring to Branton) talk to Doc something with reference to the timber proposition, but I don't remember anything that was said. I possibly knowed at the time. Q. Didn't he ask Dr. Gesner there in your presence if he would make any contract to buy the land, of any kind, and did not Dr. Gesner tell him no. And didn't he say, Well then, I don't want to take the claim. A. I don't remember of it. Q. You don't remember what was said. A. I don't remember that being—Q. What say *Q*. A. I don't remember anything like that being said there. Q. Well, do you remember of anything being said between Branton and Gesner? A. I remember their talking together, but I don't remember what *what* said. Q. You don't remember about what they said? A. No. Q. But you remember they were talking the matter over? A. Why, they were talking something about the timber I presume. There was a conversation there anyway. Q. Right there in the presence of all of you, eh? A. Oh, there was several standing around. Q. That was during the general talk Dr. Gesner was making? A. Yes, sir, about that time."

1005 Did you so testify?

A. I think I did, but I didn't remember it at that time.

Q. You didn't remember it at that time?

A. No, sir.

Q. Your memory is pretty bad as to what occurred at that time?

A. (No answer.)

Excused.

1006 CAMPBELL DUNCAN recalled for further examination.

By Mr. BENNETT:

Q. Mr. Duncan, did you see Mr. Branton when he was here testifying the other day?

A. Yes. I was in the court room a short time.

Q. He is the same man that went up there in the timber with you, is he?
A. Yes sir.
Q. You don't deny that?
A. No sir.

Excused.

1007 Thereafter one, WILLIAM ADAMS, was called as a witness, and after testifying that he had a ranch near Prineville, where Campbell Duncan was working, and that the witness Branton came along there in June, 1902, was asked the following question, "well, did he state to you that he was going to Idaho at that time? To which defendants objected as incompetent and not a proper impeaching question, and no proper foundation laid for it, but the objection was overruled and the defendants excepted, whereupon the witness answered: "Yes sir."

Thereupon the following questions were asked, Q. "At the time of the conversation I refer, was this man Branton there at your place?" A. Yes sir. Q. How long was he there? A. Three nights and days. Q. I am talking about the time he was camped there. Did he then state to you that he was going to Idaho? To which question the defendant objected as not a proper impeaching question and no proper foundation laid for it and incompetent, but the objection was overruled and the defendants excepted. Whereupon the witness answered, "Yes sir." Q. Was Duncan present when he said this? Was Cam Duncan present when Branton said it to you? A. Yes sir.

The following is all of the testimony of the aforesaid witness William Adams introduced at the trial.

1008 WILLIAM ADAMS, sworn on part of the government, testified:

Direct examination.

By Mr. HENEY:

Q. Mr. Adams, where do you live?
A. Prineville.
Q. What business are you in?
A. Why, I ain't in any business; I moved there a couple of years ago.
Q. Did you have a ranch near Prineville in 1902?
A. Yes sir, about eight miles from there.
Q. About eight miles from Prineville?
A. Yes sir.
Q. Do you know Campbell Duncan?
A. Yes sir.
Q. Was he working for you in June, 1902?
A. Yes sir.
Q. Do you remember a man coming along there by the name of Branton, Clarence Branton?

A. Yes sir.

Q. Did he say anything to you about where he was going at that time?

Mr. BENNETT: That is objected to as incompetent and not a proper impeaching question, and no proper foundation laid for it.

Q. Well, did he state to you that he was going to Idaho at that time?

A. Yes sir.

Mr. BENNETT: We make the same objection to that question, and move to strike out the answer, as we did not have time to object before the witness answered the question on the ground that it was not called to the attention of the witness, and no foundation laid for it.

COURT: Was it called to the attention of Branton?

1009 Mr. HENEY: Yes. Here is the way the question was asked on cross-examination: "I think you were on your way to Idaho, weren't you. A. When I met Campbell Duncan? Q. Yes. A. No, sir, I was not. Q. Do you say you were? A. I did not. Q. You didn't tell him that? A. I did not. Q. Didn't tell anybody that? A. I did not."

The COURT: Let him answer.

Mr. BENNETT: We object to the question and the answer as not being proper rebuttal, and as being an impeachment question without any foundation having been laid, or the time and place or persons present being called to the attention of the witness.

Q. At the time of the conversation I refer, was this man camp there at your place?

A. Yes, sir.

Q. How long was he there?

A. Three nights and days.

Q. I am talking about the time he was camped there. Did he then state to you that he was going to Idaho?

Mr. BENNETT: We renew the objection heretofore made.

Objection overruled; defendants except.

A. Yes, sir.

Q. Was Duncan present when he said this? Was Cam Duncan present when Branton said it to you?

A. Yes.

Mr. BENNETT: We make the same objection to this and take our exception.

Cross-examination.

By Mr. BENNETT:

Q. You remember Mr. Branton being there?

A. Yes, sir.

Q. And going up with Campbell Duncan the next morning to the timber?

1010 A. Yes, sir.

Q. Did you see this gentleman Branton when he testified here on the stand?

A. No, sir, I did not see him.

Q. You were not here?

A. I was not in the courtroom.

Q. You don't know then whether it was the same man or not?

A. I did not see him here.

Q. Where were you subpœnaed, Mr. Adams, to appear here as a witness?

A. Prineville.

Q. You came all the way down here from Prineville to testify to this?

A. Yes.

Q. When was it you were subpœnaed. When was the subpœna served on you? You say on the 21st of August?

A. The 21 of August I was to be here, and the subpœna was served four or five days before that.

Q. And you have been down here ever since?

A. Yes, sir.

Q. Ever since the 21 of August?

A. Yes, sir.

Redirect examination:

Q. You were subpœnaed before the grand jury?

A. Yes, sir.

Q. And you haven't got through there yet, have you?

A. I don't know.

Excused.

1011 And thereafter, one FRANK RAY, was called as a witness and having testified that he met the witness Branton on the road east and north of Prineville in May or June, 1903, was asked the following question, "And on that occasion, did he say to you that the reason he did not take a timber claim at that time that he was up there at the shearing plant was because there wasn't enough in it, or words to that effect?

To which question the defendants objected upon the ground that there was no proper foundation for impeachment, and also that the circumstances for time, place and persons present were not called to the attention of the witness Branton while he was on the stand, but the objection was overruled, to which ruling defendants excepted and their exception was allowed: Thereupon the witness answered, "Yes, he did."

There was no foundation for the foregoing impeachment question, except as hereinbefore set forth, in relation to the cross examination of the witness Branton.

The following is all of the testimony of the aforesaid witness Frank Ray introduced at the trial.

1012 FRANK RAY, witness called for the government, being duly sworn, testified as follows.

Questions by Mr. HENEY:

Q. Mr. Ray, where do you reside?
A. Five miles from Prineville.
Q. How long have you lived up there?
A. I was raised there.
Q. How long have you known Mr. Williamson?
A. I have known Williamson ever since I have been old enough to know anybody.
Q. How long have you known Dr. Gesner?
A. About fifteen years.
Q. And how long have you known Mr. Biggs?
A. About eight years, I guess, eight or nine; something like that.
Q. You filed on a timber claim, you and your wife both filed on a timber claim, in 1902, did you not?
A. Yes sir.
Q. Who first spoke to you about filing?
A. Well, my father-in-law, Green Beard first spoke to me.
Q. What did he say to you?

Objected to as incompetent.

Mr. HENEY: Green Beard testified that they told him to get his son and his family to file.

The COURT: It is admissible then.

Defendants except.

Q. What did he say?
A. He come along there from town, stopped at my house and told me that Williamson and Gesner was having some timber claims taken and they wanted me—I and my wife—to take one. He was going to take one. They had spoke to him and his wife.

Mr. BENNETT: We want our objection to stand as to each of these defendants, separately.

1013 A. He told me the proposition.
Q. What did he say the proposition was?

Same objection.

(Mr. BENNETT:) Of course, this all goes in, I suppose, subject to our objection.

The COURT: Yes.

Q. Did he tell you who made the proposition to him?
A. Yes sir.
Q. Who did he say?
A. He told me Biggs did.
Q. What did he say the proposition was?
A. For us to take a timber claim and Gesner would give us $500 apiece for it at the time final proof was made. He would furnish the money to prove up on it.
Q. Did he tell you how much you would make out of it?

A. He said about $75.
Q. Apiece?
A. Yes, sir.
Q. What did you say?
A. Well, I told him I would go—he said for us to go the next day up to the shearing plant.
Q. You told him you would?
A. Yes, sir.
Q. And you did, did you?
A. Yes, sir.
Q. Now, when you got up to the shearing plant whom did you find there?
A. Well, there was Beard and his wife and Frank Beard, Campbell Duncan, and his wife, and a fellow that come there with him. They said his name was Branton. He was a stranger to me. And Dr. Gesner come in a few minutes. He wasn't there when we first got there. And Charley Graves and Wakefield—Irwin Wakefield—was there.
Q. Wakefield was a partner of Gesner's?
A. Yes sir.
Q. You understood?
A. Yes sir.
Q. And Graves was the surveyor?
A. Yes sir.
Q. Was anything said about what Graves was doing there?
1014 A. Well, I don't know as there was anything said, but he was surveying, I suppose. I saw him along the road—him and Doc—as we went up that morning—down along—they were surveying.
Q. They were surveying together?
A. Yes sir.
Q. What, if anything, was said by Dr. Gesner in regard to the terms of taking up. State all that was said by him.
A. Well, he said that he wanted to get us to take up some timber claims; that there was quite a timber craze in there and he was afraid Eastern people would come in and get the timber and take the range away from the sheep—stock—something. I don't know as he mentioned sheep. And he told us that he would give us $500 apiece for the claims when the proof was made. He would put up the money for us.
Q. Did he say anything about a mortgage?
A. Yes sir.
Q. What did he say about it?
A. He said he would have to take a mortgage to make things look right.
Q. Now do you remember whether he asked anything about whether you would agree to it or not or whether anything was said on that subject?
A. Well, he told us what he wanted us to do and we went—he said he would take us and show us the ground—land—that afternoon, and I supposed—that was my understanding.

Mr. BENNETT: We object to what he supposed.

Q. What was your understanding?

Objected to as incompetent, immaterial and not binding on the defendants.

A. We agreed to do what he proposed to us. That was my understanding.

Mr. BENNETT: I wish you would not answer the questions until the Court rules upon them.

1015 The COURT: I think that is competent. He can testify as to his understanding.

Mr. BENNETT: We take an exception.

Q. Do you remember anything being said about whether it was satisfactory or not.

A. How is that?

Q. Do you remember anything being said *by* as to whether it was satisfactory or not?

Objected to as leading.

Q. By Dr. Gesner?

A. Why, I don't remember what he said. He just told us what he wanted us to do and he said—I supposed he understood that it was satisfactory; yes. I don't know as he said anything right then.

Mr. BENNETT: I move to strike out what he supposed.

The COURT: Avoid giving suppositions. State what was said and what was done.

Mr. BENNETT: That goes out, does it?

The COURT: Yes.

Q. Did he at any time ask you whether it was satisfactory or not, or anything to that effect?

Objected to as leading.

A. No, I don't know as he did.

Q. After he had made this statement did he ask which one of you wanted to know where your claims were, or anything of that kind?

A. Yes sir. He told us he would show us the land he wanted us to file on.

Q. Now then, did he go with you—or anybody with you—or what was said as to where you were to file?

A. He went along with I and my wife to file on and Beard and his.

Q. What did he say to you when you got there to the land?

A. He said it was the corner. He showed us the corner of the section there—section thirty.

1016 Q. Did he say that was the one he wanted you to file on?

Objected to as leading.

A. He said he wanted us to file. He didn't say which corner he wanted us to file on.

The COURT: Avoid leading questions.

Q. Now, did you go over the whole section?

A. No sir.

Q. You just went to that one corner?

A. Went across up to that corner—yes, sir. Quite a little piece off the road, where we went to come to this corner.

Q. Then after going to that corner what did you do?

A. Looked around there a little and got in the rig and went back.

Q. Was it on the road?

A. No; it wasn't on the road.

Q. Did you drive the rigs over there?

A. Yes sir. It was a quarter of a mile, I guess, off the road.

Q. That you drove over?

A. Yes sir.

Q. All the way?

A. Yes sir.

Q. Then you turned back?

A. Yes sir.

Q. Did Gesner go back with you?

A. I think he did; yes.

Q. Where to?

A. He went down to the shearing plant. I think he stayed all night. It was getting late and we came on home that night. I wouldn't be sure—he might have come on down.

Q. You folks went home, did you?

A Yes sir. He might have come on to town. I don't know whether he did that night or not.

Q. Who gave you the numbers—the description of the land?

A. Mr. Biggs. He gave me the numbers that I filed on.

Q. Did you get any numbers when you were out there in the timber?

A. No sir.

Q. Who told Biggs what numbers you were to file on, do you know?

1017 A. No I don't. I supposed Mr. Gesner did.

Q. Now when did you go to Biggs' office to file with reference — your going back from the timber?

A. It was the next day.

Q. And who went with you when you went?

A. Well, there was I and my wife and Beard and his wife and Cam Duncan and his wife—we all went together when we went to file.

Q. Who was in the office besides Biggs and you folks? any one?

A. I don't remember whether there was or not. I don't hardly believe there was.

Q. Now at that time, before Biggs, did you sign these two papers?

A. Yes sir; I signed them.

Q. And do you remember as to being sworn to them?

A. Yes sir; I think I was sworn to them.

Q. By Biggs?
A. Yes sir.

Mr. HENEY: We will offer these two in evidence.
Marked Plaintiff's Exhibit 20.
Mr. HENEY: The date is June 30th on all of these.

Q. Did your wife sign two papers there at the same time?
A. Yes sir.
Q. Is that her signature on each of these papers?
A. Yes, sir.
Q. Did she swear to them?
A. Yes sir, I think he swore her.

Mr. HENEY: We will offer those two in evidence.
Marked Plaintiff's Exhibit 21.

Q. Now, at the time you were sworn to these papers was there any talk in regard to whether you had the right to make these statements in the papers, or do you remember reading or hearing read this statement:

1018 * * * That I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not directly or indirectly made any agreement or any contract in any way or manner with any person or person whomsoever by which the title I may acquire from the government of the United States may inure in whole or in part to the benefit of any person except myself.

Do you remember that statement—reading or hearing it read through?

A. Yes, sir, I think I do.

Q. Now was there any talk about it as to whether you had a right to make that statement or not?

A. There was something said about that, and Biggs said a man had a right to; if he disposed of the land it would be to his benefit,—that is, what he got for the land; that it would be nothing wrong for a man to do that.

Q. That is, that the $75 would be to your benefit?
A. Yes, sir.

Objected to as leading on a very vital point.

Q. State as fully as you can all that he said.

A. Well, he said that he thought that would be to my benefit—the money that I was to get for the land.

Q. How did that conversation come up, do you remember?
A. No, I don't know just how it came up.
Q. Was there anything said about the arrangement with Gesner?
A. No, I don't know as there was.
Q. And was that in the presence of your wife that this was said?
A. Yes sir; she was there.

Q. Well, at the time that you signed that what was your intention as to what you would do with the land when you obtained title?

Mr. BENNETT: We want all this to go in subject to our same objection.

Mr. HENEY: You may answer the question.

A. Well, my intention was to let him have the land was my intention.

Q. For how much?

1019 A. For $500.

Q. What was your understanding as to whether you had agreed to do that?

Objected to as incompetent and not in any way binding on any of the defendants.

The COURT: He may state his belief.

Q. What did you believe as to whether you had?

Same objection.

Objection overruled.

Defendants except.

A. I believe I had when I filed on that land.

Q. Believed you had agreed to deed it to him for the $500?

A. Yes sir.

Q. You had told your wife the same thing, had you?

A. Yes sir, she understood it the same as I did.

Q. Now, did you prove up on the land?

A. No sir.

Q. Did you pay your filing fees?

A. No, sir.

Q. Did anybody pay them for you?

A. Nobody. I gave a note for my filing fees.

Q. What talk did you have about that before hand?

A. Why in the morning when I went to town along about ten o'clock I saw Gesner and was talking to him and he wanted me to furnish my filing money. I told him I wouldn't do it; if I had to furnish my own filing money I wouldn't file on the land. So he went off, he was gone awhile and he came back and told me for me to go up to Biggs' office and draw up a note and Biggs would fix it up for me, and go ahead and file on the land.

Q. Then when you got up to Biggs office what conversation did you have about the note before filing or at the time of filing? Any?

A. No, sir, no conversation, I don't think, just went ahead and filed and he drew up the note. Biggs understood it, I suppose he did from the way he acted.

1020 Q. He produced the note without your telling him?

A. Yes, sir, he did.

Q. And you signed the note?

A. I know I signed the note.

Q. For how much?

A. $19.00.

Q. Was the notice of final proof published?

A. Yes sir.

Q. Why didn't you prove up?

A. Well, just about two weeks, I guess, or maybe only a week—I don't remember the exact date—I saw Mr. Gesner and he told me to relinquish; that they were getting into trouble over this land business and the best thing for me to do was to relinquish my right until it was over with, and then, he said, there might be a chance for me to take the land again, if it was still left vacant.

Q. It was about a week or two weeks before the final proof you mean?

A. Yes. I don't think it was over a week.

Q. And where did that conversation take place?

A. It took place on the sidewalk there close to his office.

Q. Was there anything said about what your wife should do?

A. Yes. He told me for her to relinquish too.

Q. What did you tell him in reply?

A. I?

Q. Yes. What was your answer to him in regard to that as to whether you would or not?

A. Well I don't think I told him whether I would or not, that day.

Q. Then how long after that did you relinquish?

A. Well, it wasn't long—just a few days.

Q. Is that your signature? Is that the relinquishment you filed?

A. Yes sir.

Q. Is that your wife's signature?

A. Yes sir.

Q. You went before Biggs, did you, to relinquish?

1021 A. Yes sir.

Mr. HENEY: We will offer these two in evidence. They are dated September 4, 1902. (Two relinquishments). Marked Plaintiff's Exhibit- 22 and 23.

Q. What if anything, was said by Biggs in regard to your note that you had given for the filing fees, when you relinquished?

A. Why, he got the note. He told me to take it and destroy it, or something that way; it was no good now, or something like that. I don't know just the words he used.

Q. Now, at the time you filed, did Biggs give you any memorandum of the lands you filed on?

A. Yes sir.

Q. Is that it?

A. Yes, that's it.

Q. What was the conversation in regard to that?

A. When he gave me this?

Q. Yes.

A. Why he told me I had better take a description of the land so I would remember what it was.

Q. Whose hand-writing is that?

A. That is Biggs'. He wrote it out himself.

Q. Write while you were there?

A. Yes sir.

Mr. HENEY: We will offer that in evidence.
Marked Plaintiff's Exhibit 24.

Q. When you went to Biggs to relinquish, did Biggs have anything to say about your relinquishment?
Q. Yes sir.
Q. What did he say?
A. He said that Doc was getting scared and there was no use in it. He might as well went ahead with it and let us prove up.

Cross.

Questions by Mr. BENNETT:

Q. Was there a good many people coming in and taking timber lands in that country that summer, Mr. Ray?
1022 A. There was a good many; yes.
Q. Coming in from the East—strangers?
A. Yes, sir; I think so.
Q. Now, you say you had lived in that country ever since you were born?
A. Yes, sir; I was raised there in that country. I had not been right there all the time, but the principal part of the time, I have.
Q. That has been your home ever since you was born?
A. Yes sir.
Q. Your father and mother came there to that country before you were born?
A. No; not before I was born. I was about two years old when they came there.
Q. And how old a man are you now?
A. Thirty-three.
Q. Then you came there thirty-one years ago?
A. Yes sir.
Q. That was a new country then?
A. Yes, sir; pretty new.
Q. And when these Eastern people were coming in there in great flocks and taking up the land, you people who had lived there a long time, kind of got the land craze too, didn't you,—a good many of them?
A. There was some of them, I guess, did, probably.
Q. Thought that they had as much right to the benefit of the piece of timber land as outsiders had?
A. Yes sir.
Q. Now, you don't claim to have talked with Biggs at all before you went to his office to file on the land?
A. No sir.
Q. Nor with Williamson?
A. No sir.
Q. Indeed, you never claimed to have any talk with Mr. Williamson about it?
A. Never did.
1023 Q. The only talk you had before you went there to file was with Dr. Gesner?

A. Yes sir. That morning that I went up there to file on the land was the first talk I had.

Q. And with your father-in-law, Mr. Beard?

A. Yes sir.

Q. Now who did you say went up there with you that day?

A. Just my wife and myself went up in the rig together.

Q. Well, did you see anybody else on the road going up?

A. I didn't see them on the road. They were there when I got there.

Q. What time of the day did you get there?

A. About eleven o'clock, I guess, or a little after.

Q. And you staid there until after dinner?

A. Yes sir. Stayed there quite a while.

Q. Who all was up there?

A. Well, there was Beard and his wife, Frank Beard, Cam Duncan and his wife, and this Branton, Doc Gesner, Charley Graves and Erwin Wakefield was there when we got there, and there was some more come.

Q. Who came afterwards?

A. Ben Jones and his wife, Joe Calavan and his wife.

Q. Did they get there before dinner?

A. Yes sir, I think they did—just about. They got there before they ate their dinner.

Q. Where is this Joe Calavan?

A. Joe Calavan?

Q. Calavan—yes. Where is Joe Calavan?

A. You say where is he now?

Q. Yes.

A. He is here in Portland, I suppose. I saw him here.

Mr. HENEY: You have, too, haven't you Mr. Bennett?

Mr. BENNETT: No; I haven't, I don't know where he is or anything about him.

Mr. HENEY: Dr. Gesner has seen him and talked with him.

1024 A. The Government had him subpœnaed here at the last trial, you say, do I know whether they have or not?

Q. I say, was he subpœnaed here by the government at the last trial?

A. Why, I think so. I don't know as he was, but I think he was.

Q. Do you know whether he is subpœnaed at this trial or not?

A. I think he is this time.

Q. By the Government?

A. Yes sir.

Q. Have you seen him at this trial?

A. Yes sir.

Q. Now how long—was it after dinner that Dr. Gesner made the talk that you have testified about?

A. It was just after dinner.

Q. Where were you all?

A. Out there in the yard—well, on the ground there by the house.

Q. Did Dr. Gesner come up and make a little speech to you?

A. He was up part of the time and part of the time he was sitting down on a stump or log or something.

Q. Was he making a little speech explaining what he had a right to do and what he should do and what he would do?

A. He said what he would do; yes, sir; and talked there with us.

Q. Now, when you went out to look at the land which one of the Beards was it that went with you?

A. Why it was, I think they all—all the Beards was up there; that is, the old man and his wife and Frank. I think Frank went along, too.

Q. Your father-in-law went with you?

A. Yes sir.

Q. Well, now, did your father-in-law get the numbers of all of that land while you were out there together? Take it down with *with* him?

A. Not as I know of; no, sir.

Q. Well, do you know whether he did or not?

A. If he did he never said nothing to me. I never seen them.

1025 Q. Did you know of his getting any numbers at all?

A. I don't know what he got. He might have got the numbers for his or something that way. He might have got the numbers for his I don't know.

Q. He might have got the numbers for all, might he not? You didn't see what he did get, did you?

A. No sir; I never saw it.

Q. If he got any numbers there you didn't notice it?

A. No sir.

Q. Or if you did you didn't remember it?

A. Well I never noticed it. If he had gotten them and I had seen them, I would have remembered it.

Q. Don't you think a thing of that kind might have slipped out of your memory in three years?

A. I don't think so.

Q. You don't think so?

A. No, sir.

Q. Now, as I understand you, you say now that Dr. Gesner said that he would take a mortgage so as to make everything look right. At the first trial you testified that he mentioned taking a mortgage so as to make everything right.

A. I think I *had* that same answer that I did this time.

Q. You think you did?

A. Yes sir.

Q. You don't think he testified that way; the way I have asked you then?

A. Well, I think I told just the same as I did this time; "It looked right."

Q. Then you don't think you answered in answer to the question asked you by Mr. Heney: "say anything about a mortgage?" Answer: "Yes, sir; he mentioned taking a mortgage; said he would take a mortgage so it would make everything right."

You don't think you answered that way?

A. Well, it might have been that way or it might have been the other.

1026 Q. Don't you recognize that that makes a great deal of difference whether it is that way or the other way?

A. No sir.

Q. Now, in going to this corner of the land did you cross the land that you filed on?

A. Go across it?

Q. Yes. Did you go across it in going to the corner, or did it lay so that you did not have to cross it in going up there?

A. Well, we might have crossed a little of it, but didn't cross much. I don't know just how it laid there.

Q. Did you see the corner?

A. Seen what he said was the corner; yes.

Q. Was there numbers on the corner?

A. I never examined the corner.

Q. You didn't examine the corner to see whether there were numbers or not?

A. No, sir.

Q. You say the surveyor was there?

A. The surveyor was there and Mr. Gesner. They surveyed it out, I guess, the way they talked.

Q. Didn't Mr. Gesner make out all of the numbers for the land on one paper there while you were standing there on the corner and give it to Mr. Beard, your father-in-law?

A. I never saw him do that.

Q. Now, there was a misunderstanding after you came down between you and Gesner as to who was to advance the filing fees. He claimed that you were to advance them and you claimed that you understood from the talk up there that he was to advance them.

A. My understanding was that he was to furnish all the money, that day; yes, sir.

Q. Campbell Duncan and you were right together when you had that talk up at the shearing plant and heard the same thing?

A. We was there when Doc was talking—when he made that talk; yes. We was there all sitting around.

1027 Q. And you might have been mistaken as to the arrangement that was made up there when Campbell Duncan and you and Dr. Gesner were there together. You might have misunderstood the Doctor; that is what I mean.

A. Well, I might—the way I understood it, he was to furnish all the money. That was my understanding there that day.

Q. But he claimed that that was not his intention or his understanding?

A. Well I don't know as he claimed that. He just wanted me to furnish the filing fees the next morning.

Q. Well, didn't he claim that he had not agreed to furnish any filing fees or advance any filing fees or loan you any filing fees at all?

A. No, I don't think he said that he had not agreed to. We supposed he would.

Q. Anyway you had some little talk about that—misunderstanding—about it, or talk. He claimed that you should put them up and you claimed that he should?

A. Yes. He asked me to pay the filing fees. He asked me to put the filing fees up, and I told him if I had to put up the filing fees I wouldn't file on the land.

Q. So he went off?

A. That was about all there was to it.

Q. Do you know whether he saw Campbell Duncan after he went off before he came back to you?

A. I don't know whether he had or not.

Q. You don't know?

A. No, sir.

Q. But anyway, after he had been gone a while he came back and told you that you could give a note for the money and fix it up that way and to go to Biggs and he would fix it for you?

A. Yes. He told me that he would take a note and to go ahead and file on the land.

Q. The note was for $19, was it?

1028 A. Yes sir; for $19.

Q. Do you remember whether the note was given for a year or not?

A. I think it was given for six months.

Q. You think it was given for six months?

A. Yes; as far as I know. We was talking there and he said he would give us plenty of time to get the title for the land, about that time.

Q. And the note was drawn for six months?

A. I am pretty sure that it was; yes sir.

Q. Wasn't it drawn for a year?

A. No. I don't think it was drawn for a year.

Q. Now, what conversation do you say you had with Dr. Gesner when he told you that you had better relinquish? Let the matter go?

A. Well, he told me that we better relinquish; that they was having trouble over the land.

Q. That they were making trouble?

A. Yes sir.

Q. And he thought the best thing to do was to let it go for the present?

A. For me to relinquish until it was settled—quieted down, and then, he said, I might get a chance to take the land again.

Q. If you wanted to take the land later on why you could do so?

A. Yes sir.

Q. Did you say that Mr. Biggs read over the affidavit that you signed?

A. Yes sir.

Q. Who was present when you went in there that day? Who was there when you went into Biggs' office?

A. Why I don't remember who was there when I went in.

Q. Was Duncan and his wife there?
A. I don't know but what they were.
Q. What say?
A. They might have been there. They filed that same day that I did.
1029 Q. Well, where were they when you went in? That is what I am getting at.
A. I don't know whether they were there when I went in or not. I couldn't say whether they were or not.
Q. Do you remember whether they were there when Biggs read over your affidavit?
A. No, I don't remember. I know that Duncan was there when he drawed up that note.
Q. Was he there when Biggs read over the affidavit to you?
A. No, I don't know whether he was or not.
Q. You don't remember that?
A. No, sir.
Q. Do you remember his reading over the affidavit?
A. He read it.
Q. Did he read over your wife's too?
A. I don't know whether he read over her's or not.
Q. She was there and heard yours?
A. She was there. I guess he just read one, that was all.
Q. Did he give it to you to read after he had read it?
A. Yes sir.
Q. Did he give your wife's to her?
A. Yes sir.
Q. You both read your affidavits over?
A. Yes sir.
Q. And he read it to you?
A. He read one.
Q. You read it carefully?
A. Pretty carefully.
Q. What say?
A. Yes sir.
Q. Who was there when the affidavit was read over besides yourself and wife that you know of?
A. I don't know whether they was still in there or not, I don't know but what they had filed and went out maybe—out of the room. I wouldn't be sure.
Q. Well, was Mr. Beard and his wife there?
A. They was there during the time that we was filing.
Q. Were they there when the affidavit was read over?
A. I don't know whether they were or not. I couldn't say. They might have been, and they might not.
1030 Q. Was Henry Beard and his wife there?
A. No sir.
Q. This man Branton, or Brandon, where did he live?
A. I don't know where he lived. He lived in the valley some I think. Down here in the valley about Eugene.
Q. Where is he now?

A. I don't know.

Q. Do you know where he lives?

A. I think he lived at Eugene. I think that is what he said there that day. I heard him talk. He was a stranger to me. I never saw him before that day.

Q. Now, Doctor told you up there that day that he would loan you the money to prove up on the land and take your note for it, did he?

A. He said he would let us have the money and take a mortgage, a note; I suppose he would want a note.

Q. Did he tell you this? That he would loan you the money to prove up on the claim,—all of you—if you wanted to take them?

A. I don't know as that is just what he said.

Q. Well, you testified to that at the other trial, didn't you?

A. I might have.

Q. At the first trial?

A. I don't know. I might have testified. It was something that way.

Q. Didn't you testify exactly that way?

A. I might have done it.

Q. Didn't you testify in answer to the question: "Did the Doctor tell you up there that day that he would loan you the money to prove up on a claim—all of you—if you wanted to take them?" did you answer: "Yes; he did?"

A. I might have answered it that way.

Q. Well, do you remember whether you did or not?

A. Well, I wouldn't say that I did exactly that way, but I think that is.

1031 Q. Right afterwards was the question asked you: "He said he would take your note?" and did you say: "Yes, sir" to that?

A. He said that he would take our notes.

Q. You did answer that way, then?

A. Yes sir.

Q. You remember that, don't you?

A. Yes sir.

Q. Did he say something to you there about that he would not charge you any interest on the money as long as he had the use of the grass?

A. I never heard him say anything about that.

Q. Never heard him say anything about the grass at all?

A. No sir. Not as I remember of.

Q. Didn't you testify at the other trial, in answer to the question: "Didn't he say that as long as you folks let him have the grass—(I mean in the first trial, now) "Didn't he say that as long as you folks let him have the grass he would not charge you any interest on the money?" and did you answer: "I don't know just what was said about that. I don't remember what it was. —. There was something said about that wasn't there? (Answer:) Yes sir, there was something said about the grass all right but I don't remember what he did say about the grass."

Did you answer that way?

A. I don't think there was anything said about the grass.

Q. You don't think now that there was anything said about the grass.

A. No.

Q. Well, did you answer that way at the other trial?

A. Not at the second trial, I didn't. You asked me that question.

Q. Well, at the first trial I am asking you?

A. Well, I don't think I did; no.

1032 Q. He told you, did he, that the law allowed him to take a mortgage on that claim?

A. Yes sir.

Q. He did talk to you then about what the law allowed something? He said at any rate that it would allow him to take a mortgage on the claim; you remember that?

A. Yes, sir; he said that. I remember him saying that.

Q. What say?

A. Yes sir.

Q. And he said the law allowed him to loan you the money and to take a mortgage on the claim, didn't he?

A. Yes sir.

Q. Didn't he tell you that he had taken advice about that?

A. That he had?

Q. Did he tell you that he had taken the advice of a lawyer about what he would do lawfully in the matter?

A. I don't know as he said that he had but I supposed that he had by his making that remark.

Q. You don't remember whether he said so or not?

A. No sir.

Q. From something that happened up there you understood that he had?

A. Well, by him saying that he was allowed to do that I supposed he had. I don't know whether he had or not.

Q. Now, you testified at the other trial, did you not, at the first trial, in answer to the question, "You never said I will sell you this land when I get title, did you?" "No sir. I never told him I would sell him the land when I got title." Then the question being asked—"You never told him that you would sell him the land? A. I didn't tell him that." And then the question, "And the only thing that was said, he made you an offer for the land of $500, when you got title, if you wanted to sell it? A. Yes sir. He said he would give me $500 for the claim. Q. That was practically all that was said about it? A. That was about all. Q. You didn't say you would sell to him at all? A. No sir. I didn't tell him I would sell. Q. Didn't say anything one way or the other? A. No sir. Q.

1033 About selling to him? A. No, sir. Q. You made no agreement with him about that at all, as to what you would do? A. There wasn't anything said about that at all. Q. As to what you would do? A. No, there was nothing said as to what I would do. Q. It was simply an offer on his part of what he would do? A. Yes sir."

Did you so testify?

A. I think that is about the way I testified.

Q. That was about right, was it? Did he tell you up there that day that he didn't want to violate the law?

A. I don't know whether he said he didn't want to violate the law or not. He said he wanted, he would have to take a mortgage on the claim.

Q. Well, didn't he tell you that he didn't want to do anything to violate the law? That he wanted to arrange it so that there would be no violation of the law?

A. I don't know what he did say about that.

Q. You don't remember what he did say? He said something about that, did he?

A. He might have said something about that, but I don't know just what it was.

Q. Now, at the time of the talk about this relinquishment, he told you that you had better relinquish; that he didn't want to furnish the money and that he wouldn't furnish it; said he wouldn't and didn't want to any how; there was so much trouble over these timber frauds, and he would get into trouble, and he also said that he thought it would be the best thing for you to do, because there was so much trouble over these land matters and timber claims, and he wanted you to relinquish, didn't he? That is, in substance right?

A. Yes.

Q. Well, did he tell you that as he had had the use of the grass that he would pay the filing fees, do you remember?

A. Sir?

Q. Do you remember whether he told at that time that, as
1034 he had had the use of the grass, he would pay the filing fees, so that you would not be out anything?

A. No, he never told me that.

Q. You don't remember having any talk about that?

A. No sir. There was nothing said about that.

Q. Now, as I understand your testimony at the other trial; you testified that he did say something in that conversation to the effect that the law didn't allow him to make a contract; that he couldn't make a contract, but you think it referred to a written contract; is that right?

A. Yes sir.

Q. Have you ever talked with any of the defendants about this case since you have been down here?

A. No sir.

Q. Nor with any of their attorneys?

A. No sir.

Q. You have talked with Mr. Neuhausen and Mr. Heney frequently?

A. No not very; I talked with Neuhausen a little but I never did talk to Heney about it.

Q. Never talked to him at all?

A. No sir. Not that I know of.

Q. Have you talked with Mr. Neuhausen frequently?
A. No sir.
Q. How many times?
A. Once I think is all this time.
Q. Once, this time; since you have been down here this time?
A. Sir?
Q. How many times altogether have you talked to Mr. Neuhausen?
A. Oh, three or four times.
Q. Talked it over with him?
A. I don't know that I talked it over; talked a little while about it.
Q. About how long would you talk about it at a time?
1035 A. Oh, two or three minutes.
Q. What say?
A. A couple or three minutes.
Q. Not more than that at any time?
A. No, I don't think at any time it was over three minutes.
Q. Have you talked with Mr. Burns about it?
A. No, sir.

Redirect examination:

Q. He asked you, when he asked you at the other trial about making the contract up there, if you didn't make a certain statement, or if you understood he meant a written contract. Now, at the second trial weren't those questions asked you, and weren't these your answers? These are the questions by Mr. Bennett:

"Now Dr. Gesner told you up there at that time that the law allowed you to give him a mortgage? A. Yes sir. Q. And allowed him to loan the money and take a mortgage? A. Yes sir. Q. Didn't he also tell you that the law didn't allow him to make any contract for the land, or you to make any contract to sell it to him? A. I don't know just what he did say about that, about the contract. Q. Didn't he say something about the law not allowing him to make a contract, or about he couldn't make a contract to buy it nor you couldn't make a contract to sell? A. Yes, my understanding is that he said a man couldn't draw up a contract, or something that way. Q. He told you that he couldn't make a contract? He told you that, did he? A. I think so. Q. And that you couldn't make any contract to sell to him? A. No, he didn't say that I couldn't. He said that he couldn't—that is to draw up a contract. Q. What say? A. He said that he couldn't draw up a contract, that a man couldn't do that. Q. Well, now didn't he say that he couldn't make a contract in any way, nor you couldn't make a contract? Q. No, he didn't say nothing about me making a contract at all. Q. He did say that he couldn't make a contract? A. He said that he couldn't draw up a contract with us; that is, what he said. Q. Didn't he say he couldn't make a contract? A. No, I don't think he said it just that way. The reason I think he said it that way, because some of them thought maybe that he might go back on it or something that way.
Q. That he might go back on them? A. Yes, if there
1036 was no contract drawed up; or something that way. There was something mentioned about that—about drawing up a

contract. Q. Didn't he tell you in that conversation that he couldn't make any contract nor you couldn't make any contract? A. No, sir, he never said that he couldn't make any contract he didn't say that; but he did say something about that he could not. Q. That he couldn't make any contract? A. Yes, sir; that is to draw up a contract. Q. Didn't he say that he couldn't make any contract? A. No, I don't think that he said that he couldn't make it. Q. You think he used the words "Draw up?" A. Well, the reason I think—— Q. I don't care about your reason; but you think that he used the words "draw up?" A. Yes, sir, I think he did. Q. Now, didn't he say in the same conversation, that when you got title if you wanted to sell to him he would give $500. A. No. Q. What say? A. No sir. Q. He didn't say that? Didn't you testify in the other trial that he did say that? A. He said this; that for us to take the claims up and that he would furnish the money, and he would give us $500 a claim. Q. Didn't he say, if you wanted to sell that he would give you $500 for the claim? A. He didn't say the way you put it there to me; when we got a deed if we wanted to sell he would give it to us.

Mr. BENNETT: The only question I asked him about the second examination had references to what he said about the contract.

Mr. HENEY: This is all in regard to that conversation.

Mr. BENNETT: The only question that I asked him, your Honor, was this. I said, I understand from your testimony in the other cases that you claim that there was some talk about whether he could lawfully make a contract there, but that your understanding was that it had reference to a written contract, and he said yes. Now, that is the only question that I asked him about the second examination, I think, at all, and this other matter now that they have been asking him about probably has reference to that matter, but what they are asking him now has reference to other matters, about which I didn't ask him at all.

Mr. HENEY: This applies particularly in regard to that testimony of his in the other trials in regard to how he understood it,
1037 because he explained *her* further on; that particular part I was just reading I don't care so much for as I do this part in regard to that contract. He went on to explain further here in regard to that.

Mr. BENNETT: I am not objecting to that in relation to the contract. I think it is a close question as to whether it comes within the rule, but I don't make any objection to it.

Mr. HENEY: Then we will jump down to that.

"Q. Now you never said to him that you would sell him the land when you got title, did you? A. Yes sir. I supposed it would be sold. Q. What say? A. That was my intention—to let him have the land when I got title. Q. Well, but you didn't tell him that you wouldn't sell him the land when you got a title, or that you would sell anybody the land when you got title? A. Well, I was supposed to let him have it when I got the title. Q. You didn't tell him? A. No, sir. I don't know as I told him that. Q. You never said a

word about what you would do? A. I told him I would take the claim the way he wanted me to. Q. But you didn't tell him you would sell the land when you got title? A. I don't know as I did; not those words; not in that way. Q. Isn't the reason why you didn't say a word about that because he told you you couldn't make any contract of that kind, and because you understood that you could not? A. The reason there was nothing said about that was because it wasn't necessary.

Do you remember giving that testimony?

A. Yes sir.

Q. Is that your present understanding of it?

A. That is my present understanding.

Q. And why wasn't it necessary to say anything?

Objected to as incompetent and immaterial.

A. Because he understood it the way it was, was the reason.

COURT: I don't think that is quite a proper question.

Mr. HENEY: Well, we will withdraw it.

Mr. BENNETT: I suppose whatever he said in relation to that, I didn't quite catch it, I suppose it goes out?

Q. Now, in the first trial, in regard to this same matter, wasn't this your testimony?

1038 "You made no agreement about it at all, as a matter of fact? A. There was no written contract drawed up nor nothing. It was just as I told you, is the way it was."

A. I think so.

Q. Did you have a conversation with Mr. Biggs before you came down, after you had been subpœnaed before the grand jury? You were subpœnaed before the Grand Jury in February.

A. Yes sir.

Q. And before you came down, did you have a talk with Mr. Biggs up in Prineville, or in that vicinity?

A. Yes sir. There in town; a minute or so.

Mr. HENEY: This is offered against Biggs only.

Q. What if anything did he say to you?

A. He told me there was one thing he wanted me to remember when I got down here, and to say that there was no contract drawed up; he wanted me to bear that in mind.

Q. How large a place is Prineville; about what population, do you know?

A. I don't know just how many; it ain't a very large place.

Q. You don't know what the population is?

A. No, sir, I don't.

Q. Had you the money to take up a timber claim with, at the time you filed?

Mr. BENNETT: This goes in subject to our objection, your Honor.

COURT: Answer the question.

A. No, sir.

Q. For either yourself or your wife?

A. No sir.
Q. She didn't have?
A. No sir.

Recross-examination:

Q. You mean that you didn't have the money without borrowing it?

A. Yes, sir, I didn't have the money without borrowing it.

1039 Q. You didn't think that that was any reason you should not have a timber claim, because you were too poor to pay for it without borrowing it?

Mr. HENEY: That would make a very good argument, Judge. It isn't very important at the present.

Q. Did you answer the question?
A. No, sir. I ain't answered it yet. How was the question?
Q. (Read.)
A. I don't know as it was.
Q. You say about this talk that you had with Biggs up there, that *you* was before you were subpœnaed before the Grand Jury in the first place?
A. That was after I was subpœnaed.
Q. Before you had attended?
A. Yes sir.
Q. Before you came down here?
A. Yes, before I came down.
Q. Biggs claimed to you it was no contract, didn't he? He always claimed to you that there was no contract, didn't he?
A. I don't know as he ever said anything to me about it before.
Q. You don't know that he did at that time?
A. At that time.
Q. Yes.
A. That is all he said that I remember; he just came to me there.
Q. Didn't he tell you that you knew there was no contract?
A. No, I don't know as he said that I knew there wasn't any contract.

Witness excused.

1040 FRANK RAY, called on part of the government, testified:

Direct examination.

By Mr. HENEY:

Q. Mr. Ray, do you remember Clarence Branton, a man who was up in the timber at the time you went up there to make a filing?
A. Yes sir.
Q. Have you seen him here at this term of court?
A. Yes sir.
Q. Did you meet him on the road east and north of Prineville in May or June, 1903?
A. Yes sir.

Q. And on that occasion, did he say to you that the reason he did not take a timber claim at that time that he was up there at the shearing plant was because there wasn't enough in it, or words to that effect?

Mr. BENNETT: We object to that question upon the ground that there is no proper foundation for impeachment laid, and that the circumstances of time, place, and persons present were not called to the attention of the witness Branton while he was on the stand.

Mr. HENEY: The witness Branton testified that he met Frank Ray at this particular place at that time. (Mr. Heney here read the evidence given by Branton on this point.)

Objection overruled; defendants except.

Q. Yes he did.

Q. Now, up in the timber, do you remember whether Branton talked or did you see Branton talking to Dr. Gesner when you were present?

—. Yes sir.

Q. Do you know whether or not Branton was insistent upon knowing whether Dr. Gesner would enter into a contract with him in writing?

1041 Mr. BENNETT: We object to that as not a proper impeaching question, and no sufficient foundation laid for it.

Q. Was he insistent upon knowing how much there was in it for him if he took a claim?

Same objection. Objection overruled, defendants except.

A. Yes sir.

Q. Did Branton insist upon knowing whether Gesner would give him a positive agreement to pay the $500, put up the money, and pay the difference between the amount of proof money and the $500 at the time of the final receipt?

Mr. BENNETT: We object to that as not proper redirect examination, not proper impeaching question, no sufficient foundation laid, and time, place, and persons present not called to the attention of the witness.

Objection overruled; defendants except.

Q. Do you remember the question?

A. Yes.

Q. What is your answer?

A. That is the way I understood it, that he did.

Q. Did he ask Dr. Gesner, whether he would put it in writing or not?

Same objection.

Objection overruled; defendants except.

Q. No, I don't remember that.

Q. Didn't Dr. Gesner tell him he could not draw up any contract because that would get him into trouble with the government, but he

would take the claim and give $500 for it as soon as he had the title to it?

Same objection. Objection overruled; defendants except.

A. Well, now, I can't answer all of that just the way you put it there. A part of it I don't know as I understood in the talk, but where he mentioned about the contract, Doc told him he could not draw up a contract——

Mr. BENNETT: We object to that as improper.
1042 Objection sustained.

Q. Did Dr. Gesner say this in substance to him, whether it was the exact language or not, that he could not draw up any contract because that would get him into trouble with the government, but that he would take the claim and pay $500 as soon as Branton had title?

Mr. BENNETT: We make the same objection to that question.
Objection overruled; defendants except.

A. Well, yes, part of it, and part of it——

Mr. HENEY: I think the witness is entitled to say what part.

Mr. BENNETT: If a part of that question had been propounded to the witness Branton, he might have answered "Yes, I said that." To allow this witness to answer this question is to permit an impeachment without ever giving the witness sought to be impeached an opportunity to say whether the particular part was spoken or not. Here is a long conversation put to a witness, and he is asked if he said it. And he might with perfect propriety say no, even if there might be some little part of it that he did say.

Mr. HENEY: It was followed by the question to Branton, "Did you say that in substance?"

The COURT: Let me see the testimony of Branton?

(After examining the testimony) Repeat the question to this witness, and the witness listen attentively. (The question was read to the witness.) Now, your answer to that question should be yes or no.

A. I can answer the first part of that question, but the latter part I can't answer.

The COURT: I think the witness can explain. On what principle may he not?

Mr. BENNETT: Well, that is what I have been trying to present to your Honor; perhaps I have not made myself clear; per-
1043 haps I am wrong about it. My idea is that when an impeaching question is put, *who* whole of it or the substance of it must be repeated to the other witness, that is the very reason why you cannot ask a witness to go on and state his version of it.

The COURT: What will you do with the answer, "Yes, in part."

Mr. BENNETT: It seems to me that shuts the matter out. And if there has been any evidence to go to the jury in the answer that is worth while, the court can strike it out. *And if there has been any*

evidence to go to the jury in the answer that is worth while, the court can strike it out.

The COURT: I think he can answer that part of it which he desired to say yes to, and that part of it which he desires to say no to; I am not sure but what he can go on and explain.

Defendants except.

Q. What part of it do you say yes to?

A. The part where the Doctor told him that he could not draw up a contract, for he would get into trouble with the government. That part of it I can answer.

Q. What do you say as to that?

A. I say that he did.

Q. The Doctor said that?

A. Yes sir.

Q. Now, did not the doctor say he would take the claim and pay $500 as soon as he got the title?

Same objection. Objection overruled; defendants except.

A. Well, I don't know whether he said that or not right at that time.

Mr. BENNETT: We move to strike out the answer to the first question as not being the same question that was asked the witness, and not a proper impeaching question.

1044 Objection overruled; defendants except.

Q. Now, did someone there say something about the homestead law, and then did Branton say, "It is just like this. The whole damn thing is a lie from beginning to end. Why, who the hell would take a homestead unless he could get something out of it," or that in substance?

Mr. BENNETT: We object to that as not a proper impeaching question, and as immaterial, being an attempt to impeach the witness in relation to an immaterial statement, and there being no sufficient foundation laid, time, place, and persons present not sufficiently identified to the witness Branton.

Objection overruled; defendants except.

A. Yes sir.

Q. That is, Branton said that?

A. Yes sir, Branton said that.

Cross-examination.

By Mr. BENNETT:

Q. Who do you claim was present when this talk you have now testified to occurred?

A. Why, there was several around there.

Q. What say?

A. There was several around there; I don't know just how many.

Q. Who were they as near as you remember? Was that when Dr. Gesner was making his speech that he testified about?

A. Well, it was during that time, yes.

Q. Or making his talk; I don't know whether you call it a speech or talk.

A. It was just before I think.

Q. At that time, was it?

A. Yes, sir, just a little while before, I think. He was off a little to one side from the rest when he was talking to Branton.

Q. Off a little to one side?

1045 A. A little bit.

Q. Who was off to one side with him?

A. Branton was the main man that was talking to him, asking him.

Q. Who else was there within hearing distance?

A. How?

Q. How close were they to the rest of you?

A. Quite close; in hearing distance of all of them.

Q. All of you gathered around there?

A. Yes sir, they were around there; they had been listening.

Q. Was that the same conversation you testified that Dr. Gesner made up there, in your direct examination, when you were on the stand before in this trial?

A. No, sir, it was not exactly the same talk.

Q. Was it before or after that talk

A. It was just before that he done this talking to Branton.

Q. That is, he talked to Branton, you claim, before?

A. I think it was before. I would not be positive whether it was just before or just after, but I think it was just before.

Q. How long before?

A. Just a little while.

Q. Part of the same conversation, was it?

A. No, it was not what you would call a part of the conversation, because he was talking to Branton first. Branton, it seemed like, wanted to find out a little more about it than what he understood.

Q. Branton seemed to be more particular than the rest of you about how the thing was, did he?

A. Well, he seemed to be doing more talking.

Q. Inquiring more carefully?

A. Yes.

Q. When was it you claim Branton had this talk about the homestead? When was that, before or after Dr. Gesner made his talk?

Q. Where he made that remark about the homestead?

Q. Yes, the remark you claim he made about the homestead.

1046 A. That was during the time he was talking with Doc.

Q. That was before you or Doc and the rest of you had the talk?

A. Well, I say I think it was. I wouldn't swear positive it was before, but just about the time.

Q. You didn't know Mr. Branton was here at the time you testified before?

A. No sir, I did not.

Q. And you didn't tell this part of the conversation that you told now?

A. Well, I was not asked that part.

Q. Wasnt' you asked to tell all that was said up there?

A. Well, I don't know. I don't remember that that question was asked me before as to what he said.

Q. Did not Mr. Heney ask you this question? "What if anything was said by Dr. Gesner in regard to the terms of taking up? State all that was said by him." Wasn't that question asked you?

A. It might have been.

Q. Don't you know that that called for everything? But you didn't know that Branton was here then?

A. No, I didn't know that he was here.

(Redirect:)

Q. Did the conversation between Branton and Gesner come to your mind when you testified before?

Objected to as leading.

Q. When did it first come to your mind?

A. I don't know when it first came. It didn't come to my mind before, that conversation didn't.

(Cross:)

Q. Didn't come to your mind until when?

A. I wouldn't say when. I didn't think about it then when I was testifying before.

Excused.

1047 After the defendants had closed their testimony and rested their case, the government called Mr. L. T. Perry as a witness on rebuttal, but before Mr. Perry had responded or taken the stand, the prosecuting attorney announced that he desired to recall the defendant Gesner, whereupon the following proceedings were had:

Mr. BENNETT: As your witness?

Mr. HENEY: No, I do not desire to call him as my own witness. I want to ask him one more question on cross examination.

Mr. BENNETT: In relation to that matter?

Mr. HENEY: In relation to this letter of June 23. I forgot whether I asked him about that letter or not.

Whereupon the defendant on behalf of the defendant Gesner and the other defendants objected to his being recalled for that purpose, but the court ruled that he must take the witness stand whereupon said defendants excepted to his being compelled to take the stand in relation to the matter at that time, and said witness took the stand in compliance with the order of court.

Q. Dr. I will ask you to examine that certified copy of those letters, and you can examine the certificate also. The letter referred to was as follows:

PRINEVILLE, OR., *June* 23, 1902.

M. L. Chamberlain, Salem, Or.

MY DEAR SIR: Inclosed find check for $80 for payment on the West half of Section 16, T. 15 S. R. 19 E. containing 320 acres. My sister Mrs. S. M. Gerowe will, forward the application as soon as she can sign it. Who has the S.E. ¼ of that Section. Is it paid up on or is it subject to a new filing. Please let me know at your earliest convenience.

6-25" $80 Check.

I remain,

Yours Respect. VAN GESNER.

1048 To which said defendant Gesner and each of the other defendants then and there objected upon the ground that it is not proper cross examination and not proper rebuttal, and because it compels the defendant to testify in relation to a matter after he has left the stand and his cross examination closed, and the defendant case rested. But the objection was overruled and said defendants and each of the defendants excepted. Whereupon the witness answered, "I guess I wrote that letter." Q. You think you wrote that letter? A. Yes. Q. And received the reply that is attached there? A. I don't remember the reply; I don't remember anything about that. Q. But you remember writing the letter? A. I remember writing some letter there. All of which went in under the defendants' objection as aforesaid. The reply referred to is as follows:

JUNE 25, 1902.

Van Gesner, Prineville, Oregon.

DEAR SIR: I am in receipt of yours of the 23" inst., enclosing draft for $80.00 first payment on the W. ½ of Section 16, T. 15 S. R. 19 E. This tract is vacant and if application is received from Mrs. Gerowe before any other application is received for the land certificate will issue to her, but if regular application is received accompanied by required deposit before application is received from Mrs. Gerowe we will be compelled to issue certificate to the party so applying.

The S. E. ¼ of this Section was sold to E. W. Barnes, April 14, 1902, certificate No. 12389 and this certificate is not subject to cancellation.

Yours truly, M. L. CHAMBERLAIN,
Clerk of the Board.

1049 Thereupon the witness was excused. The foregoing is all of the testimony of the said witness Van Gesner upon his recall as last aforesaid.

The government then offered in evidence a certified copy of the application of Sarah M. Gerowe to the State of Oregon to purchase the W. ½ of Section 16, in township 15 South, range 19 east, dated

the 26th day of June, A. D. 1902, which application had the following affidavit attached:

STATE OF WASHINGTON, *County of Spokane, ss:*

I, Sarah M. Gerowe, being first duly sworn say: that I am over 18 years of age; that I am a citizen of the United States; that the proposed purchase is for my own benefit and not for the purpose of speculation; that I have made no contract or agreement, expressed or implied, for the sale or disposition of the land applied for in case I am permitted to purchase the same, and that there is no valid adverse claim thereto.

SARAH M. GEROWE.

Subscribed and sworn to before me this 26th day of June, 1902.

STANLEY HALLETT,
Notary Public in and for the State of Washington.

Also certified copy of a deed from the State Land Board to Williamson, Wakefield and Gesner for the same land, bearing date the 12th day of August, 1902, and a certified copy of the letter hereinbefore specified.

Whereupon each of the defendants separately objected to the paper marked Application to Purchase as being incompetent and not sufficiently proven, and as irrelevant and immaterial, and not proper rebuttal; and objected separately to each of the other papers upon the same ground, but the objections were overruled, and to the ruling of each of said papers each of said defendants excepted, and their exception was allowed, and thereupon the papers were read in evidence to the jury.

1050 And thereafter one, L. T. Perry, was recalled on the part of the government in rebuttal, and was asked the following question, "Mr. Perry, did you have a conversation with Dr. Gesner in Prineville, in 1902, in relation to school lands?

Thereupon the defendants objected to said question as not proper rebuttal and as irrelevant.

Whereupon the Court asked whether defendant had been asked on his cross examination regarding this conversation.

Whereupon Mr. Heney said, "I do not recall whether I asked him that or not, your Honor. I aimed to ask him. I will ask permission to recall the doctor and ask that question now.

Whereupon said defendant Gesner, and each of the defendants objected to the witness being recalled at that time, after the defendants had rested their case and the government had entered upon the presentation of its case, compelling the defendant to testify against himself, compelling him to be called as a witness without his consent and over his objection. But the objection was overruled, to which each of said defendants then and there excepted, and their exception was allowed.

Whereupon said defendant Gesner was again placed upon the stand and asked the following question, Q. "Doctor, in Prineville, between the 15th day of June, 1902 and the 25th day of June, 1902,

did you have a conversation with Lawrence T. Perry, in that conversation, did you ask him to sign a school land application and an assignment of the same to the firm of Williamson & Gesner or Williamson, Wakefield & Gesner, and state to him that the land was up in Horse Heaven country; and did he ask you how much there would be in it for him, and did you answer $50; and did he then say, if he took up any school land, he would keep the land for his own use, and walked off and did you say, as he was walking off, that it would be no trouble, 'All you would have to do would be to go to the office and sign a paper,' or words to that effect?"

1051 Thereupon said defendant, Gesner, and each of the defendants objected to the question on the same ground as to the recalling of the witness, and upon the further ground that the matter is immaterial, irrelevant, and no proper foundation for impeachment, and is not in any way inconsistent with anything the witness has testified to upon his direct examination, and therefore not a proper subject for impeachment. But the objection was overruled, and to said ruling each of the defendants excepted, and the witness answered: "I will say I never had any such conversation with Mr. Perry as that, none whatever at any time, June, July, or any time.

Whereupon, Mr. Heney said, That is all; and the witness left the stand.

And thereupon after the witness had left the stand Mr. Heney again asked the witness to take the stand in relation to another matter.

Whereupon there was the same objection to the recalling of the witness as before; same ruling and exception.

And thereupon the witness was again recalled, over his objection, and asked the following question, "On or about June 24, 1902, in Prineville, did you ask Mary W. Swearingen to file upon 320 acres of school land in section 16, township 15-19, in the Horse Heaven Country and tell her that you would give her $50, if she would make the application and assignment to Williamson & Gesner, or Williamson, Wakefield & Gesner, or words to that effect? Or, did you tell her you would give her $25 for filing upon 160 acres, at the same time and place?

Whereupon said defendant, and each of the defendants objected upon the same ground as in the Perry matter hereinbefore referred to, and upon the further ground that it was not proper rebuttal, immaterial, irrelevant, and an attempt to prejudice the defendant by bringing in other matters having no relation to the matters charged in the indictment. But the objection was overruled and to

1052 the ruling each of the defendants excepted; thereupon the witness answered, "Why, I think she filed upon a piece of land up there, but there was no contract to sell it to me. She was keeping boarders there, and there was a vacant piece, and I told her she could make something out of that land by filing on it, and if she wanted to file on it, I would let her have the money, and I did let her have the money, I think, and she filed on the land and I bought the land of her. But I had no contract with her before to buy, no specified sum or anything else."

Q. When did you buy the land from her Doctor?

Mr. BENNETT: I want our objection and exception to all this your Honor.

The COURT: I understand it applies to all this testimony.

Q. You say you bought the land from (her) afterwards?
A. I think so, yes.
Q. How long afterwards?
A. I don't know; I don't *what* remember.
Q. What did you pay her for it?
A. I don't remember what I gave her now.
Q. You put up the $200 to pay for the land to the state at the time?
A. Yes.
Q. Who did you turn that over to? J. J. Smith, county clerk?
A. I don't know whether I turned it over to him or let her have the money. Probably I let her have the money.
Q. Did you suggest to her that she buy it?
A. I might have spoken to her about it.
Q. You don't know when you got the deed?
A. No, I don't.
Q. And didn't you get it at the same time that she signed the Application?
A. No sir.
Q. When do you think you got it?
A. I could not say.
Q. Haven't you any idea?
1053 A. No, I haven't now.
Q. Did you place it on record?
A. I think it is on record.
Q. When did you put it on record?
A. I could not say for that either.

Mr. BENNETT: It is understood our objection goes to all this, as to each of the defendants separately?

The COURT: Yes.

Excused.

The foregoing is all of the testimony of the aforesaid witness introduced at the trial during the time when he was last twice recalled to the witness stand as aforesaid, and it together with the direct examination, cross-examination, re-cross and re-direct as hereinbefore set forth is all of the testimony of the aforesaid witness Van Gesner introduced at the trial of said cause.

1054 Thereupon L. T. PERRY was recalled on behalf of the Government and asked the following question: "Mr. Perry, in Prineville, between the 15 and 26 of June, 1902, did Gesner ask you to sign a school land application and an assignment to the firm of Williamson Wakefield & Gesner or Williamson & Gesner, and did you ask where the land was, and did he tell you it was up in the Horse Heaven Country; and then did you ask him what there would

be in it for you, and did he answer $50? And did you then tell him if you took up any school land, you would keep the land for your own use, and did you start to walk off, and did he then say, it would be no trouble, 'All you have to do would be to go to the office and sign a paper?' To which question the defenadnts, and each of them objected as incompetent, immaterial and not proper rebuttal, and not a proper impeaching question, not inconsistent in any way with the testimony which the defendant had given, and therefore not a proper subject for impeachment; and because there is no sufficient foundation laid because there was no statement in the question asked of the witness Gesner as to who was present, and no definite statement as to the time when it occurred. But the objection was overruled and the defendants each of them then and there excepted, and the witness answered, "I had a conversation with Dr. Gesner, but I am lost as to the date; I would not say as to the date you speak of. "Q. How do you fix the date, how near do you fix the date? A. Well, my impression is that it was in June, 1902, but I am not positive. I believe that it was in June, 1902, that the conversation was had between Dr. Gesner and me. Q. Is it your best recollection that it was in the latter part of June? Ob-
jected to as leading. Objection overruled. Defendants ex-
1055 cept. A. It was some time between the 10 and 24 or 25; somewhere about that time. Q. Now answer the question. Whereupon objections of the defendants were renewed, and there was the same ruling and exception thereon. A. The conversation that occurred between Dr. Gesner and myself occurred in front of Temple's drug store. He asked me this question, if I didn't want to take up a piece of school land—that conversation in substance and effect took place.

The following is all of the testimony of the aforesaid witness L. T. Perry introduced at the trial.

1056 L. T. PERRY, a witness called on behalf of the Government, being first duly sworn testified as follows:

Direct examination.

Questions by Mr. HENEY:

—. Mr. Perry where do you live?
A. I live in Prineville.
Q. Were you there in June of 1902?
A. Yes, sir. For a short time.
Q. At what time? What part of June?
A. Between the 6th and the 24th, as near as I remember.
Q. Now how do you fix the 6th?
A. Sir?
Q. What event, if anything, fixes the 6th of June in your mind as being the day you were there?
A. Well, after we got done shearing the sheep, I came into Prineville for the purpose of getting supplies to take to the mountain and

I staid there until about the 24th, and then I went on into the mountains with my supplies.

Q. How do you fix the 6th of June as being one of the days you was there?

A. I think I was there on election day.

Q. And during the time that you were in there in June, did you see Mr. J. N. Williamson there?

A. I did.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. What was it?

A. Well, we talked a little about different matters, and in the course of the conversation, he mentioned the fact that he wasn't at the meeting at Antelope when the allotments were made for forest reserve permit, by the sheep men there. He wasn't there on account of his being unable to be there, I think he said, for the lack
1057 of sleep, or something of that kind; exhausted with his work in getting the nomination for Congress.

Q. When did that meeting take place? That is that Antelope meeting?

A. I am not positive, but some time along about the first days of April.

Cross-examination.

Questions by Mr. BENNETT:

—. That was in June, was it, Mr. Perry?

A. Yes sir. That is that I saw Mr. Williamson.

Q. Yes. Do you remember what time in June?

A. No, I couldn't say, but it was the latter part of June; that is, it must have been between the 15th and the 24th some time.

Q. Some time after the election?

A. Yes, it was some time after the election.

Q. This Antelope meeting that they talked about at which the allotments of the range were made by the Government, that was along back in April, was it?

A. That was in April.

Q. And you were present at that meeting?

A. No, sir.

Q. And Mr. Williamson said that he wasn't present at the meeting?

A. Yes, he told me that he wasn't.

Q. On account of the campaign and lack of sleep?

A. Well, it was on account of his efforts in getting the nomination as I understand it.

Q. Efforts to get the nomination and lack of sleep?

A. Yes, he said that he was exhausted.

Q. Tired out?

A. Tired out.

Q. Well, now, didn't he tell you in this conversation up there at

Prineville, that he was tired out from the campaign that he had just gone through?

1058 A. No, I didn't understand it that way; I don't think that he had any effort in being elected after he got the nomination. I didn't understand it that way. It might have been but I didn't understand it that way.

Q. Don't you know that he travelled all over the district making his campaign?

A. Well, I don't know.

Q. Well, didn't he mention that fact to you, that he was tired and worn out and glad to get away from the politicians?

A. I don't remember that. I don't remember it that way.

Q. Did he tell you how he came to be up at Prineville at that time?

A. No sir.

Mr. HENEY: I would be willing to admit that he was both tired and glad to get away from the politicians.

Witness excused.

1059 *In Rebuttal.*

Mr. L. T. PERRY was again called by the prosecution and the following proceedings were had:

Mr. HENEY: I will call Mr. Perry—before I put Mr. Perry on the stand I want to recall Dr. Gesner to ask him one question.

After Dr. Gesner was examined Mr. L. T. Perry was recalled on the part of the government.

Direct examination.

By Mr. HENEY:

Q. You have been called before have you?

A. Yes.

Q. Mr Perry did you have a conversation with Dr. Gesner in Prineville in 1902 in relation to school land?

Mr. BENNETT: That is objected to as not proper rebuttal and is irrelevant.

The COURT: Was Dr. Gesner asked whether he had this conversation or not on his cross-examination?

Mr. BENNETT: I don't think he was, your Honor.

Mr. HENEY: I do not recall whether I asked him that or not your Honor. I aimed to ask it. I will ask permission to recall the Dr. and ask that question now.

Mr. BENNETT: We object to the defendant being recalled at this time after the defendants have rested their case and the government has entered upon the presentation of its case, as compelling the defendant to testify against himself, compelling him to be called as a witness and over his objection.

Objection overruled; defendants except. Mr. Perry leaves the witness stand.

After some testimony by Dr. Gesner Mr. L. T. Perry was again recalled on the part of the government and testified:

1060 Direct examination.

By Mr. HENEY:

Q. Mr. Perry, in Prineville, between the 15 and the 25 of June, 1902, did Dr. Gesner ask you to sign a school land application and an assignment to the firm of Williamson, Wakefield & Gesner or Williamson & Gesner, and did you ask him where the land was, and did he tell you it was up in the Horse Heaven country; and then did you ask him what there would be in it for you, and did he answer $50? And did you then tell him if you took up any school land, you would keep the land for your own use, and did you start to walk off, and did he then say, it would be no trouble, "All you would have to do would be to go to the landoffice and sign a paper?"

Mr. BENNETT: We object to that as incompetent, immaterial, not proper rebuttal, and not a proper impeaching question, not inconsistent in any way with the testimony *has* given on the stand in his direct case, and therefore not a proper subject for impeachment; and because there is no sufficient foundation laid, because there was no statement in the question asked of the witness as to who was present, and no definite statement as to the time when it occurred.

Objection overruled; defendants except.

A. I had a conversation with Dr. Gesner, but I am lost as to the date; I could not say as to the date you speak of.

Q. How do you fix the date, how near do you fix the date?

A. Well, my impression is that it was in June, 1902, but I am not positive.

Mr. BENNETT: What was that last?

A. I believe that it was in June, 1902, that the conversation was had between Dr. Gesner and me.

Q. Is it your best recollection that it was in the latter part of June?

Objected to as leading.

1061 A. It was some time between the 10 and 24 or the 25; somewhere about that time.

Q. Now answer the question.

Mr. BENNETT: I renew our objection, that the foundation has not been laid and for the other reasons.

Objection overruled; defendants except.

A. The conversation that occurred between Dr. Gesner and myself occurred in front of Temple's drug store. He asked me this question, if I didn't want to take up a piece of school land——

Mr. BENNETT: We object to that as not proper.

Objection sustained.

Q. Yes, or not, if you can, as to whether that conversation I have repeated—that conversation in substance—and effect?
A. Yes sir, it did.

Mr. BENNETT: We move to strike out the testimony of this witness upon the same grounds as are stated in the objection heretofore made.

Objection overruled; defendants except.

Cross-examination:

Q. Who do you claim was present, Mr. Perry?
A. No one but myself and him.

Excused.

Court adjourned until 9:30 to-morrow morning, September 22, 1905.

1062 Thereafter Mrs. Mary Swearingen was called as a witness by the Government in rebuttal, and having been shown an application for State School Lands of which the following is a copy:

"Application to Purchase.

To the State Land Board:

I hereby apply to purchase the following described school lands situated in Crook County, Oregon; to-wit: Northeast quarter of Section 16, all in township 18 South, Range 19 East containing 160 acres, and I agree to pay for the same according to law.

MARY J. SWEARINGEN.
Signature of Applicant.

This 24th day of June, A. D. 1902.

STATE OF OREGON, *County of Crook, ss:*

I Mary J. Swearingen, being first duly sworn, say that I am over eighteen years of age; that I am a native born citizen of the United States; that the proposed purchase is for my own benefit and not for the purpose of speculation; and that I have made no contract or agreement, expressed or implied, for the sale or disposition of the land applied for in case I am permitted to purchase the same, and that there is no valid adverse claims thereto.

MARY A. SWEARINGEN.
(Signature of Applicant.)

Subscribed and sworn to before me this 24th day of June, 1902.

J. J. SMITH,
County Clerk, Crook County, Oregon.

(being the application hereinbefore referred to) was asked the following question: "Will you state to the jury the circumstances under which you signed that paper, how you came to do it?"

Whereupon each of the defendants objected upon the ground that it was immaterial, irrelevant, tending to drag in collateral matters and not proper rebuttal. Whereupon the District Attorney proposed to limit this testimony to defendants Williamson and Gesner.
1063 Whereupon the defendants Williamson and Gesner each objected upon the same grounds, and upon the ground that the defendants are charged with conspiracy between the three of them to suborn perjury in the matter of government land, and that this proof, as referred to state land in which Williamson and Gesner were alone concerned and is entirely a separate matter in which it is only claimed that two of the defendants were concerned, and where any oath taken would be before some entirely different officer; but the objection was overruled and to said ruling each of said defendants excepted; whereupon the witness answered, "Well, there isn't much to it. The Doctor, just came down and asked me if I would file on a piece of school land; so I told him I would." JUROR: I can't understand you. A. I say that he came and asked me if I would file on a piece of school land. I told him that I would I went there and filed on the land. He was to give me $25 for filing on the 160 acres, as well as I remember; I don't remember just the amount. So I went before the County Clerk, Mr. Smith, and I filed on the school land.

Whereupon the following questions were asked and answered, subject to the same objection, ruling and exception: Q. Now just what did he say when he said that he wanted you to file on it, just what did he say. Tell the whole thing. A. Well, I don't remember just how it was. Q. No; but the substance of it as you can recollect it. A. Well, just as well as I remember, he came down and he said that he would give my daughter and I $50 to file on a quarter section or a half section—something—I don't remember the amount; but any way, when the time came and we went to the Clerk's office, part of it had been taken or he didn't want part of it—something like that, or they didn't say it was for him at all. Just asked us to file on it. And so my daughter didn't file, I filed on it and he gave me $25. Q. Now when you went up to file what did you do when you got before the Clerk, how did you come to go there? A. Well, I
1064 don't remember why or how I came to go there. Q. When you went there did you have a description of the land. A. No sir. Q. And when you got there did you tell the Clerk what land you wanted? A. The description was there. Q. He had it did he? A. The Clerk had it, yes sir.

Whereupon the government offered the application in evidence to which the defendants and each of them objected as being immaterial and irrelevant, tending to drag in collateral matters to the prejudice of the defendants, and not proper rebuttal and not proper impeaching testimony, and no sufficient foundation laid. Whereupon the objection was overruled and the defendants each excepted, and their exception was allowed.

The following is all of the testimony of the aforesaid witness Mary Swearingen introduced at the trial.

1065 Mrs. MARY SWEARINGEN, witness called on behalf of the government, being first duly sworn, testified as follows.

Direct examination.

Questions by Mr. HENEY:

Q. Mrs. Swearingen, is that your signature upon that paper?
A. Yes, sir.
Q. And do you remember of swearing to that paper before the County Clerk, Mr. Smith?
A. Yes sir.
Q. That is an application for school lands. Will you state to the jury the circumstances under which you signed that paper, how you came to do it?

Mr. BENNETT: We object to this, Your Honor, upon the ground that it is immaterial, irrelevant, tending to drag in collateral matters and not proper rebuttal; and we make this separately as to each of the defendants.

Objection overruled.

COURT: You may consider that objection as applying to all the testimony in relation to this matter.

Mr. HENEY: This testimony in relation to this matter is offered only as against Williamson and Gesner.

Mr. BENNETT: That makes another proposition still; another proposition, then. The defendants in this case are charged with a conspiracy between the three of them, Biggs, Gesner and Williamson, to suborn perjury in the matter of government land. Now the proof is, as I understand it, to show a matter in relation to State land, in which Williamson and Gesner were alone concerned. The defendants are charged with conspiracy to suborn perjury before Biggs, who was a commissioner of the United States. Now they are offering to prove that two of the defendants in an entirely independent matter and I suppose the claim is that two of the defendants were in another conspiracy in relation to the State lands; and
1066 necessarily, if any oath was taken it would be before some entirely different officer.

COURT: The offer is limited, you say, to the defendants, Williamson and Gesner.

Mr. HENEY: Williamson and Gesner.

Mr. BENNETT: Our objection goes to each of those then, and as to each of those we except; and also as to Biggs, of course.

Q. Now, you may tell the jury Mrs. Swearingten, how you came to sign that paper.
A. Well, there isn't much to it. The Doctor just came down nad asked me if I would file on a piece of school land; so I told him I would.

JUROR: I can't understand you.

A. I say that he came and asked me if I would file on a piece of school land. I told him that I would. I went there and filed on the land. He was to give me $25 for filing on the 160 acres, as well as

I remember; I don't remember just the amount. So I went before the County Clerk, Mr. Smith, and filed on the school land.

Q. Was the Doctor boarding at your house. You were a widow in 1902, Mrs. Swearingen?

A. Yes, sir.

Q. And was the Doctor boarding at your house at the time?

A. Yes sir.

Q. Now just what did he say when he said that he wanted you to file on it, just what did he say. Tell the whole thing.

A. Well, I don't remember just how it was.

Mr. BENNETT: Object to all of this.

Q. No; but the substance of it as you can recollect it.

A. Well, just as well as I remember, he came down and he said that he would give my daughter and I $50 to file on a quarter section or a half section,—something—I don't remember the amount; but anyway when the time came and we went to the clerk's office,
1067 part of it had been taken or he didn't want part of it—something like that, or they didn't say it was for him at all. Just asked us to file on it. And so my daughter didn't file. I filed on it and he gave me $25.

Q. Now when you went up to file what did you do when you got before the clerk. How did you come to go there?

A. Well, I don't remember why or how I came to go there.

Q. When you went there did you have a description of the land?

A. No, sir.

Q. And when you got there did you tell the clerk what land you wanted?

A. The description was there.

Q. He had it, did he?

A. The clerk had it, yes sir.

Q. And was the paper already made out?

A. Yes, sir; all I did was to sign it.

Q. Now, did you have any talk with him when you signed it?

A. Well, no particular; only just he asked me a few questions; not very many.

Q. What did he ask you?

A. Well, he asked me if it was for my personal benefit. I said I supposed it was when I got the money for it that was for my benefit.

Q. What did he say in answer to that?

A. Well, he said, "of course; that is the way we all understand it," or something like that.

Objected to as incompetent and not in the presence of——

Mr. HENEY: What the clerk said may go out. There wasn't any objection made to the question, but the answer and question may both go out: what the clerk said.

COURT: Let it go out then. Speak as loudly as you can Mrs. Swearingen. I cannot hear.

1068 Q. Now did you have any money and give the clerk any money?

A. No, sir.

Q. Did you handle any money at all?

A. No, sir, none at all.

Q. After that did you go back to the clerk again at any time? And when?

A. Yes, sir; as well as I remember, I did, in a few days later. I went back.

Q. What did you do then?

A. Signed the deed.

Q. Signed a deed, and when did you get the money?

A. Well, I don't remember just when it was, but I think as well as I remember, when I signed the deed, as well as I remember.

Q. And the amount you got was how much.

Ans. $25.00.

Q. Are your relations with Dr. Gesner friendly or otherwise?

A. Yes, sir; friendly.

Q. Has he been your physician?

A. Yes, sir.

Q. Have you seen and talked with him during this term of Court?

A. I have seen him, visited with him.

Mr. HENEY: We will offer this application in evidence. It is an original and it is part of the records of the State Land Board, so that it can only be read in.

Mr. BENNETT: We object to it, may it please your Honor, as being immaterial and irrelevant.

Q. Did you see Mr. Smith sign it?

A. Yes, sir.

Objection overruled.

Mr. BENNETT: I think I had better make another objection to it because I think it is a little different from the oral proof, that is the reason I want to cover this question by objection fully and I feared that my objection to oral proof might not cover this matter.

Objection overruled.

1069 Q. Did you say Mr. Smith signed it?

A. Yes, sir, as well as I remember.

Mr. HENEY: She has identified and saw him sign it. We will offer the paper in evidence.

Mr. BENNETT: Now, we object to the admission of the paper as being irrelevant, and immaterial, tending to drag in collateral matters to the prejudice of the defendant. We object on behalf of each of the defendants separately upon this ground and upon the ground that it is not proper rebuttal and not proper impeaching testimony and no sufficient foundation laid; and take exception.

Overruled.

Mr. BENNETT: As to each of the defendants.

(Plaintiff's Exhibit 198 read):

"Application to Purchase.

To the State Land Board:

I hereby apply to purchase the following described school lands situated in Crook County, Oregon; to-wit: Northeast quarter of Section 16, all in township 18 south, range 19 east, containing 160 acres, and I agree to pay for the same according to law.

MARY J. SWEARINGEN,
(Signature of applicant.)

This 24th day of June A. D. 1902.

STATE OF OREGON, COUNTY OF CROOK, *ss.*

I, Mary J. Swearingen, being first duly sworn, say that I am over eighteen years of age; that I am a native born citizen of the United States; that the proposed purchase is for my own benefit and not for the purpose of speculation; that I have made no contract or agreement, expressed or implied, for the sale or disposition of the land applied for in case I am permitted to purchase the same, and that there is no valid adverse claim thereto.

MARY J. SWEARINGEN,
(Signature of applicant.)

1070 Subscribed and sworn to before me this 24th day of June, 1902.

J. J. SMITH,
County Clerk, Crook County, Oregon.

Memoranda.

The foregoing affidavit must be made before a Notary Public or County Clerk.

No appraisement is necessary, as the acts approved February 21, 1887, and February 18, 1899, require that all School, University, and Agricultural College Lands be sold at the uniform price of $1.25 per acre.

Payment on any lands except Tide, Swamp, and Timber lands may be made as follows: One-fifth down, one-fifth in one year, with interest at eight per cent. per annum; one-fifth in two years, with interest at seven per cent. per annum; two-fifths on demand, with interest at six per cent. per annum. Notes for deferred payments not required.

On Timber, Tide and Swamp Lands, full payment is required.

For Tide Lands a special application is prepared, which will be sent you on application.

Lands heretofore sold by certificate of purchase and lapsed to the State cannot be sold for less than the original purchase price.

Not more than three hundred and twenty acres of any kind of land shall be sold to one person."

Mr. HENEY: And then it is endorsed: "Mary A. Swearingen. Application to Purchase School Lands Township 18 South Range 19 East. Certificate of Sale No. — Cash. Issued — Deed executed June

26, 1902. State Record of Deeds, Volume Z page 363. Filed June 26, 1902. "(Signed)" M. L. Chamberlain, Clerk of Board."

Mr. BENNETT: May it please Your Honor, for the purpose of making our record complete we move to strike out this paper and also separately, the testimony of this witness in relation to the matter, upon behalf of each of the defendants, upon the same ground stated in the objection.

1071 Objection overruled.

Mr. BENNETT: We take exception on behalf of each of the defendants as to each branch of the motion.

Cross.

Questions by Mr. BENNETT:

Q. You say you have seen the defendants since you have been down here? You have seen Gesner?

A. Yes sir.

Q. How and where? You say you have seen Dr. Gesner where?

A. Well, since this term of Court, you mean?

Q. Yes.

A. Well, he has been to our house visiting several times.

Q. At your house?

A. Yes sir.

Q. Well, have you ever talked with him about this case at all?

A. No sir.

Q. You live here in Portland now?

A. No sir, not this time.

Q. You mean you have seen him since you have been here in Portland at your house?

A. Yes sir.

Q. Are you keeping house here in Portland?

A. Yes sir.

Q. Oh, you are. How long have you been living here in Portland?

A. I have been here about two years.

Q. You have never talked with him about this case in any way since you have been down here?

A. Oh, I don't know. We might have talked about it—talked it over or something. I don't remember of ever saying anything particular.

Q. Never said anything about what you were to testify to or anything of that kind?

A. No, sir. No, sir, not at all.

Q. How often have you talked it over with Mr. Heney?

1072 A. How long?

Q. How many times have you talked it over with Mr. Heney?

A. I don't remember of talking with Mr. Heney but twice.

Q. Twice?

A. Yes sir.

Q. And how many times to Mr. Burns? The gentleman who sits

back here facing the witness- while they testify. How many times have you talked to him?

A. Why, I have not talked to him at all?

Q. Haven't talked to him at all?

A. Just once.

Q. How many times have you talked to Mr. Neuhausen? Do you know him?

A. No, sir; I don't know him.

Q. He is not here, I guess, now.

Mr. HENEY: We will bring him down if you want to.

Mr. BENNETT: It is the first time he has been out.

Mr. HENEY: No it isn't the first time he has been out. He wasn't here all day yesterday.

Mr. BENNETT: What mischief was he in on yesterday?

Mr. HENEY: Well, we'll explain it all to you perhaps, when the Grand Jury meets.

Mr. BENNETT: You have threatened your witness and now you threaten us. The next thing, you will be threatening the jury and the court.

Redirect:

Q. You didn't talk to Mr. Burns there—this gentleman in the light clothes—about this matter, did you?

A. No, sir.

Q. And when did you first speak to me or any other government officer about it?

A. Day before yesterday was the first.

Q. Wasn't it yesterday?

A. Day before. No, day before yesterday was the first, the day that I came down.

1073 Q. And you told me about it yesterday?

A. Yes sir.

Q. Was Mr. Biggs at your house night before last?

A. No, sir.

Q. Wasn't he there one night this week?

A. Well, I think he was there one night this week, but not since this come up.

Q. Not since this came up?

A. No sir.

Q. Did you talk to this gentleman about the case (Referring to Mr. Neuhausen)?

Q. Yes sir.

Q. When was it?

A. Day before yesterday.

Q. That's the first time you talked about it?

A. Yes, sir.

Recross:

Q. So you talked with Mr. Neuhausen and with Mr. Burns and with Mr. Heney twice?

Mr. HENEY: She said she didn't talk to Mr. Burns about this matter at all.

A. They are all strangers to me.

Excused.

1074 And during the Government's rebuttal case, one, James Kennan, being sworn as a witness testified that the firm of Morrow & Kennan, of which he was a member, were running sheep in the vicinity of where these lands were taken during the years 1902, '03 and 1904.

Whereupon the following question was asked, "In 1902, were you threatened in any way by cattlemen in regard to running sheep?"

To which the defendants objected as not proper rebuttal, as a part of the Government's main case. But the objection was overruled and the defendants excepted. The witness answered: "No, sir."

Whereupon the following question was asked, "Were there any threats against you for running sheep in 15-19——in township 15, 19 East 15 south, in 1902?

Same objection, ruling and exception.

A. No sir, not from the cattlemen.

And the following questions were asked and answered, subject to the same objection, ruling and exception.

Q. Did you graze section 25 in 1902? A. Yes sir. Q. Did you in 1903. A. Yes sir. Q. Were you threatened any in 1903 in regard to it? A. No sir. Q. In 1904 did you graze section 25? A. Yes sir. Q. Were your sheep on section 35 in 1904? A. Yes sir. Q. How did they come to be on that section? Do you know where they were going, were they being moved? at, that time? A. I think they were, but I will not be sure; I was not there. Q. Had section 35 been grazed on prior to your sheep going on there in 1904? A. Yes sir. Q. By whom? A. By Williamson's sheep and by Gesner's. Q. Had any sheep been lambed on there in the spring of 1904? A. I could not say. Q. What time of the year were your sheep killed? A. August 19th. Q. Did you have any understanding with the cattlemen in regard to whether you could graze, 25 in 1904, prior to that sheep killing? Objected to by defendants as imma-
1075 terial, incompetent, and not proper rebuttal. Question not answered. Q. Did you have any—Q. Did you have any understanding with the cattlemen in that vicinity as to whether you could graze on 25 in the summer of 1904, before your sheep were killed? Objected by defendants as immaterial, incompetent, and not proper rebuttal. But the objection was overruled and exception allowed. A. Yes sir, we were allowed to graze that every year before until Elliott informed me that so long as we observed those lines, there would be no trouble. Q. The lines you had the year before? Same objection, ruling and exception. A. Yes sir. Question by the COURT: Who was this man Elliott? By Mr. HENEY: "One of the

cattlemen running cattle in that vicinity. The COURT: I am inclined to think that is not competent. Mr. HENEY: Let that be stricken out, then. Q. Did you hear any objections from any source against your using it in 1904 prior to the killing of your sheep? Same objection, ruling and exception. A. No sir. Q. What sort of country is that for sheep pasture in 15-19? Objected to as irrelevant, immaterial and incompetent. Objection overruled and defendants except. Q. Well, I believe it is about the best I ever saw anywhere.

The following is all of the testimony of the aforesaid witness James Kennan introduced at the trial.

1076 JAMES KEENAN, sworn on part of the government, testified:

Direct examination.

By Mr. HENEY:

Q. You are a member of the firm of Morrow & Keenan?
A. Yes sir.
Q. You were in the sheep business in the vicinity of Horse Heaven range, near Prineville?
A. Yes, sir.
Q. Where were you running wheep in 1901?
A. In that country.
Q. Were you over in 15-19? Were you running sheep in 15-19 prior to 1902?
A. Yes, we passed over it.
Q. Did you use it as a range in 1901?
Q. Yes, sir.
Q. To what extent?
A. Well, we ranged in there going in and out with our stock.
Q. In 1901, did you have any talk with Mr. Williamson in regard to that range and whether you were going to occupy it the next year?
A. I don't think I did.

Mr. BENNETT: I object to that as not proper rebuttal.
Mr. HENEY: Well, Williamson admitted it himself, so it is really not rebuttal.

Q. In 1902, did you have any talk with Williamson & Gesner or with Williamson or Gesner, in regard to sections 17 and 25 in 15-19?

Mr. BENNETT: That is objected to as not proper rebuttal.
Mr. HENEY: Williamson denied that there was any talk about his wanting to have section 25, and admitted that there may have been some talk about section 17.
Mr. BENNETT: It may be possible that is right. I will withdraw the objection.

1077 Q. Do you remember any talk in regard to sections 17 and 25?

A. Yes, sir, I had a talk with M. R. Elliott, the agent of the company, and he said——

Objected to.

Q. You did not talk with Mr. Williamson directly?
A. No sir.
Q. Nor with Gesner?
A. No sir.
Q. Then you had no talk with either of them in 1902 directly about those sections?
A. About those sections, no.
Q. Or any of the sections in there?
A. No sir.
Q. Your talk was with Mr. R. Elliott, the agent of the company?
A. Yes sir.
Q. In 1902, were you threatened in any way by cattlemen in regard to running sheep?
A. No sir.

Mr. BENNETT: We object to that as not proper rebuttal, and as a part of their main case.

Objection overruled; defendants except.

Q. Were there any threats against you for running sheep in 15-19, in township 15, 19 east, 15 south, in 1902?
A. No sir, not from the cattlemen.
Q. Did you graze section 25 in 1902?
A. Yes sir.
Q. Did you in 1903?
A. Yes sir.
Q. Were you threatened any in 1903 in regard to it?
A. No sir.
Q. In 1904 did you graze section 25?
A. Yes sir.
Q. Did you have some sheep killed in 1904?
A. Yes sir.

1078 Mr. BENNETT: We want our objection to go to all this as not rebuttal, and our exception.

The COURT: As I say, I will give both sides latitude with this witness.

Mr. BENNETT: It might be necessary for us to ask a continuance of the case, if this is gone into. There are a lot of witnesses we had in relation to this matter who have gone home.

Mr. HENEY: I won't go into anything that you will need any of those witnesses for.

Q. Were your sheep on section 35 in 1904?
A. Yes sir.
Q. How did they come to be on that section? Do you know where they were going? Were they being moved at that time?
A. I think they were, but I will not be sure; I was not there.

Q. Had section 35 been grazed on prior to your sheep going on there in 1904?
A. Yes sir.
Q. By whom?
A. By Williamson's sheep and by Gesner's.
Q. Had any sheep been lambed on there in the spring of 1904?
A. I could not say.
Q. What time of the year were your sheep killed?
A. August 19th.
Q. Did you have any understanding with the cattlemen in regard to whether you could graze 25 in 1904, prior to that sheep killing?

Objected as immaterial, incompetent, and not proper rebuttal.

Mr. HENEY: Well, let it go, then, if they don't want to get into it, we don't care.

Mr. BENNETT: If you had gone into it in your main case, we would have been glad to go into it.

Mr. HENEY: We could not go into it in our main case.

Mr. BENNETT: You did go into it with other witnesses and we did not object at all.

1079 Mr. HENEY: I never brought it out at all; you brought it into the case yourself.

The COURT: If the district attorney desires to go into it, it is competent.

Defendants except.

Q. Did you have any understanding with the cattlemen in that vicinity as to whether you could graze on 25 in the summer of 1904, before your sheep were killed?

Mr. BENNETT: This all goes in subject to our objection and exception.

A. Yes sir, we were allowed to graze that every year before until Elliott informed me that so long as we observed those lines, there would be no trouble.
Q. The lines you had the year before?
A. Yes sir.

Mr. BENNETT: We move to strike out the answer as immaterial, incompetent, and not proper rebuttal.

The COURT: Who was this man Elliott?

Mr. HENEY: One of the cattlemen running cattle in that vicinity.

The COURT: I am inclined to think that is not competent.

Mr. HENEY: Let that be stricken out, then.

Q. Did you hear any objection from any source against your using it in 1904 prior to the killing of your sheep?
A. No sir.
Q. What sort of country is that for sheep pasture in 15-19?
A. Well, I believe it is about the best I ever saw anywhere.

Mr. BENNETT: That is objected to as irrelevant, immaterial and incompetent, and we move to strike out the answer for the same reason and as not proper rebuttal.

Objection overruled; defendants except.

Q. Did you give up the use of section 17?
A. Yes sir.
Q. To Williamson & Gesner?
1080 A. Yes sir.
Q. In 1902?
A. From the time we first leased it, we turned it over to them.

Cross-examination.

By Mr. BENNETT:

Q. What time in 1904 were your sheep killed about which counsel asked you?
A. The 19th day of August.
Q. Prior to that time that summer, whereabouts had you been running them?
A. Through the Horse Heaven country.
Q. Had you been running them in 15-20?
A. No.
Q. Not at all?
A. There might have been some of them over there; they were not all over there.
Q. Whereabouts in 15-20?
A. I did not see them there in 15-20; I could not say.
Q. Do you know whether they were or not?
A. No sir; I am not positive; I am not with the sheep.
Q. You don't know where they did run then?
A. I know they ran on those sections.
Q. Don't you know as a matter of fact your herders had been running them across what was known as the dead line, all up through here?
A. I do not.
Q. At different times?
A. No sir.
Q. You don't know whether they did or not?
A. I know they did not.
Q. Had you been with them?
A. I gave them strict orders not — do it.

Mr. BENNETT: We object to that and ask that the answer be stricken out as not responsive to the question.
Motion sustained.

1081 Q. Do you know whether they have been running across there or not?
A. I could not say; I was not with them.
Q. How many times were you up there with the sheep during that summer?
A. Probably four or five times.
Q. For how long at a time?
A. Well, I was up there for a week or ten days.
Q. At a time, every time?
A. No, not every time.

Q. When you were up there, would you be out with the sheep all the time?

A. I would be from one bunch to the other, yes.

Q. How many bunches did you have?

A. We had four.

Q. Do you know whether your sheep had been running on section 24, township 15-19 or not?

A. I could not say.

Q. You could not say about that?

A. No, sir.

Q. Do you know whether they had been running on section 25 or not?

A. I think they were, yes.

Q. You think they did?

A. Yes.

Q. Do you know whether they ran on section 19 in 15-19 or not?

A. I could not say.

Q. Do you know what time of the day your sheep were killed?

A. It was about four o'clock in the afternoon.

Q. About four o'clock in the afternoon?

A. Yes, sir, just when they were breaking camp off of Horse Heaven.

Q. By masked men?

A. They were not all masked.

1082 Q. Some of them were masked?

A. Yes.

Q. How many men were there?

A. Oh, there probably was sixteen or eighteen; there might have been less, I don't know. I was not there at the killing.

Q. Did you say sixteen or eighteen?

A. I was not there at the killing; it is just what I heard.

Q. Were your sheep shot into as you were coming into that country in 1901 or in 1902?

A. They were not shot into?

Q. What?

A. There was a band of fellows got after them on Mill Creek, but they did not harm them.

Q. Did they shoot into them?

A. No, sir, if they had, they would have killed them.

Q. Did they do any shooting at all?

A. They did some shooting, yes.

Q. They did some shooting?

A. They did some shooting, yes.

Q. That was over on Mill Creek?

A. Yes, just about Sam Smith's place, what we call the Mill Creek country.

Q. Whereabouts on this map was that? Suppose that represents the Ochico, and this Prineville, and this Crooked River, and this Mill Creek coming up here, and the shearing plant in here. Whereabouts were the sheep shot into in 1901 and 1902?

A. I could not tell you on that paper.

Q. About how far above the mouth of Mill Creek?
A. That I could not tell you. It was in the Mill Creek country, what we call the Mill Creek country.
Q. About how far?
A. I could not say.
Q. Haven't you some idea whether one mile or twenty miles?
A. No, I have not.
1083 Q. Haven't you any idea? Somewhere in the Mill Creek country?
A. Yes.
Q. Was that in 1901 or 1902?
A. That was in 1904.
Q. That they were shot into over in the Mill Creek country?
A. Yes.
Q. That was not in 1901 or 1902 then?
A. No sir.
Q. What time in 1904 was it?
A. In the spring.
Q. How many men were in that crowd?
A. I don't know.

Redirect examination:

Q. Who was the sheriff of Crook County at the time your sheep were shot into?
A. C. Sam Smith.
Q. Was anybody ever arrested for it?
A. No sir.
Q. What business is C. Sam Smith in besides sheriff?
A. Well, he had been formerly in the cattle business?
Q. When did he get out of it?
A. I think when he was elected sheriff. I will not say for certain no, I don't know.
Q. Did he sell out his cattle?
A. I think he did.
Q. How long ago was that?
A. That was after he was elected sheriff, I think. I would not say for certain. I don't know much about the man's business. He may have cattle yet for all I know.

Recross-examination:

Q. When was it you understood he sold out; about how many years ago?
A. When he was first elected sheriff.
Q. That would be about how many years ago?
1084 A. I could not tell you?
Q. Two or three years ago?
A. I could not say.
Q. One year ago?
A. I could not say.
Q. Ten years ago?

A. I could not say.
Q. You could not say that?
A. No.
Q. Did you go and swear out a complaint against anybody?
A. No, sir, I informed him of the killing.
Q. You didn't put any warrant in the hands of the sheriff?
A. No, sir, he said he knew the people.
Q. What say?
A. He said he knew the people.
Q. Did you swear out any complaint?
A. No sir.
Q. Make any complaint before a justice of the peace?
A. No sir.

(Redirect:)

Q. When did he tell you he knew the people?
A. It was on a Monday, the Monday after the sheep were killed.
Q. Did he tell you who they were?

Objected to as incompetent.
Sustained.

Excused.

Mr. HENEY: If your Honor pleases, I have just secured a map that I want to offer in evidence, but I have not looked up the question whether it is competent or not. It is a map made in 1900 by the United States Government, from the reports of the geological survey, showing timber belts and other things in the State of Oregon.

Mr. BENNETT: It shows upon its face that it is absolutely inaccurate, unless all the testimony in this case on both sides, in relation to the character of those particular townships is untrue.

1085 We have in evidence a map of the country now.

Mr. HENEY: Well, if you object to it, we won't introduce it.

The COURT: It seems to be a pretty hard thing to get a map of the State of Oregon.

Mr. BENNETT: A map of the State of Oregon has been introduced into evidence, your Honor, without any objection whatever.

The COURT (Referring to the map Mr. Bennett indicated): Is that prepared by a department of the Government?

Mr. HENEY: Yes, this is dated 1897.

The COURT: And that may be considered in evidence?

Mr. BENNETT: That is in evidence as I understand it.

Mr. HENEY: All right, this may be considered in evidence by consent of both parties, and may be so marked.

Whereupon, a recess was taken until 1.45 o'clock p. m. this 23rd day of September, 1905.

Afternoon Session.

Mr. HENEY: There is one question and answer, if your Honor pleases in the testimony of Green Beard, which, after looking it over, I think ought to be stricken out. Your Honor had struck out one

answer just before that and evidently did not notice that this was the same. The question just before it is: "And he gave you to understand that you could not enter into a written form of contract," and so on, and that was objected to, and your Honor struck it out. Then the question was asked in a little different form, but it gets in the same difficulty: "Now, at the time you were making your filing, you understood that Gesner had in effect promised that he would buy the land for the $500 as soon as you got title, and furnish the money for you to prove up on, did you not?" That was objected to, and the answer was, "Yes sir." The vice of it is his understand- as
1086 to what Gesner expected, and I think it should go out and the jury instructed not to consider it. That is found on page 39 of his testimony.

The COURT: Well, it may go out.

Mr. HENEY: Now, we would like to call Mr. Keenan for one question about a matter which he had stated to my secretary, and it had not been handed to me, so that I overlooked it.

The COURT: Very well.

JAMES KEENAN, recalled on part of the government, testified:

Direct examination.

By Mr. HENEY:

Q. Mr. Keenan, shortly after the killing of your sheep, did you have a conversation with Mr. Williamson in regard to it?

A. Yes sir.

Q. Where was it?

A. It was in Dr. Gesner's office.

Mr. BENNETT: We object to that as immaterial and incompetent and not proper rebuttal.

Objection overruled. Defendants except.

Q. In Prineville?

A. Yes sir.

Mr. BENNETT: We make the objection as to each of the defendants, and take an exception as to each.

Q. Who else was present?

A. Doc Gesner. Williamson & Gesner.

(Mr. HENEY:)

Q. Then we will offer it as against Williamson & Gesner.

Mr. BENNETT: We make the same objection as to those defendants and take an exception to each.

Q. How soon after the sheep killing was it?

A. It was about three weeks I think.

Q. What was said.

1087 A. Why he was going to give us his range in the Cascade Mountains if we would give up our land up there and quit that country.

Q. Land up where?
A. In 15-19 those road sections.
Q. What reply did you make to that?
A. I told him I would not do anything of that sort until I saw Morrow.

Mr. BENNETT: We make the same objection to all of this and take our exception.

Q. Morrow, your partner?
A. Yes, sir.
Q. Did you have a conversation subsequently with him in regard to it—Williamson & Gesner—after seeing Morrow?
A. Yes sir.
Q. Were both Williamson & Gesner present at the second conversation?
A. Yes sir.
Q. How long was that afterwards?
A. Oh, it was probably—maybe a month.
Q. What was said then?
A. Well, we agreed to make the change and he was going to make it all right with me.
Q. And was that what led you to release your lease of those sections?
A. Yes sir.
Q. What was the character of his range in the Cascades, or what sort of a title was he going to let you in on there?
A. Well, I don't know; he said he would just try to make the business fit all right. That is, if we would make the change.
Q. Was that a forest reserve?
A. Yes sir.
Q. Did he have a permit?
A. I think so.

1088 Mr. BENNETT: We object as immaterial to all this.

Cross-examination.

By Mr. BENNETT:

Q. Where did you claim that conversation was? The first one you told about?
A. It was in Doc Gesner's office in Prineville.
Q. Did you have an agreement there by which you would trade ranges, virtually? That was your understanding of it?
A. Yes sir.

Excused.
The Government rests.

1089 In the Government's main case it had gone into the question of the character and quantity of timber upon the different claims in question, and among other testimony had asked the witness Campbell Duncan the following question, "How did the country so far as timber is concerned, starting with the old sheep

shearing plant, going east and north from there compare with reference to the timber as to the quality of it, with what it is right around the sheep shearing plant? A. Well I think the growth gets heavier on the north and east. Q. Going north do you go up into a higher country? A. No, no it is over a ridge down onto a stream. Q. And then from there? A. Going still farther north? Q. Yes. A. That goes over onto the Ochoco. Q. That is where these timber claims were being taken up. Is the Ochoco higher than where it is at the sheep shearing plant or not? A. No, the sheep shearing plant is on the divide or ridge or spur of the mountain and the Ochoco comes down a canyon on the other side, and I presume it would be on lower ground. Q. Where did you find the heaviest timber in that section? On the high ground or lower ground? A. Well, it is generally on the flat, I think, the best timber.

On *corss* examination the witness was asked: Q. Now the timber as you go farther up, got better did it? A. Yes, as a rule. Q. On the average as a rule? A. Yes. Q. And farther away from market didn't it? A. Yes. Q. The further away from market and somewhat better in quality as a rule? A. Yes sir.

1090 And had also propounded to the witness Gaylord the following questions which were answered by the witness as follows: (The witness having already testified that he went out on to the section of land which was afterwards taken by four of the applicants who were with him at the time.) Q. Was there a road running to it? A. Just a kind of a by road where they had been using going in and out with their sheep supplies. Q. Could you drive in there anywhere with a wagon without a road? A. Yes sir; most of the way. Objected to as immaterial and incompetent. The COURT: I don't suppose that is material. It does not appear to be now. Mr. HENEY: He stated that they were told that the land on that section was practically the same as and as good as any around there. Now I want to show what the character of that land was they were taking up for timber claims. The COURT: I think that would be competent; but whether you could drive through with a wagon has that any materiality as to the fitness of the land for timber purposes. Mr. HENEY: It speaks pretty loudly to a man who is in the habit of going through timber country as a fact bearing upon the question. Well, I will withdraw the question if your Honor has any doubt about it. Q. Would you recognize the place where you were and do you recognize it in those photographs, or could you tell? A. I don't know from a photograph of it whether I would or not. They don't look natural to me like the country would if I was there. Q. Does that look more natural. A. Yes; that looks more like it. Mr. HENEY: The photographs that the witness says looks more like it is marked "Identified by George M. Gaylord September 12th, 1905." Q. Did you see (showing photograph that you say looks more like it) did you see any timber there that was any larger size than that in the photograph? Was there any timber there larger than that appears to be? A. Yes, there was some. Q. How much? A. There was no great sight of large timber there. Q. How was that section as to whether it was open or not and as to grass? A. Well, it was pretty

fair grass range. Mr. BENNETT: Same objection, of course,
1091 to all of this. The COURT: The objection applies to all this testimony on this head. Q. How was it as to openings? A. Why it is all open timber. There is no underbrush only just once in a while a little pine thicket—something of that kind.

The following is all of the testimony of the aforesaid witness George M. Gaylord, introduced at the trial.

1092 GEORGE M. GAYLORD, sworn on the part of the Government, testified as follows:

Direct examination.

By Mr. HENEY:

Q. Mr. Gaylord where do you live?
A. Sweet Home, Lane County, Oregon.
Q. How long have you lived there?
A. I came there about fourteen years ago.
Q. Did you ever live in Prineville?
A. Yes.
Q. When did you live there?
A. I left there last Fall; I was there for about seven years.
Q. You were there for about seven years?
A. Yes.
Q. I thought you said you came to Sweet Home fourteen years ago?
A. Well I was.
Q. Well, I am kind of mixed on this.
A. Well, I lived there for fourteen years prior to the time I lived in Prineville.
Q. And then after living at Prineville seven years you went back to Sweet Home?
A. Yes, sir.
Q. When did you go back there?
A. Last fall.
Q. While you were in Prineville did you know the defendant Williamson?
A. Yes.
Q. How long?
A. I didn't know him but a short time.
Q. Did you know Gesner?
A. Yes.
Q. How much of the time you lived there?
A. I got acquainted with Mr. Gesner when I first went to Prineville.
1093 Q. Did you know Biggs?
A. I knew Biggs about two years.
Q. What were you doing at Prineville; what was your business?
A. I was what you might call a common laborer.
Q. Working around on farms and ranches?
A. Yes, sir.
Q. Did you file on a timber claim in 1902?

A. I did.
Q. Who if anybody talked with you about it before you filed?
A. John Watkins.
Q. Were you working for Watkins at that time?
A. Yes, sir.
Q. What did Watkins say about it?

Objected to as incompetent, hearsay and not the best evidence.

Mr. HENEY: We will show by Watkins that Biggs told him to get his people to go up and file on the same terms that he proposed to him.

The COURT: On that statement it may be admitted subject to the objection.

Defendants excepted.

Q. What did Watkins say to you about it?
A. Why he told me there was some parties going to file on some timber land and wanted to know if I did not want to take a claim too. Told me there would be $75 in it for me. I told him I would take a claim.
Q. Did he tell you who the people were?
A. Said it was Williamson and Gesner.
Q. Did he tell you where the claims were to be taken?
A. In the Horse Heaven country.
Q. What if anything, did he say about final proof money?
A. Well they was to furnish the money.
Q. What if anything, was said as to your going up to the timber.
1094 A. Why, he said that they was going up; that is, John Watkins and his wife, Wilford Crain and his wife, and wanted me to go with them.
Q. And you went?
A. Yes, sir.
Q. When you got up to the timber whom did you see there?
A. Mr. Williamson and Gesner and Henry Beard.
Q. Had you met Williamson before that?
A. I had saw the man but not to know him.
Q. Had not been introduced to him?
A. No, sir.
Q. Were you introduced to him there in any way and if so, who introduced you and what was said?
A. Yes, Mr. Watkins gave me an introduction to Mr. Williamson; told him I was al- right for a claim.
Q. What was said about the claims, or done about it by Williams and Gesner?
A. After we got up there?
Q. Yes. Just tell the whole story as to what happened there.
A. Well I don't know as I can remember just what was said, but the land was described to us that we was to take.
Q. Who described it?
A. Mr. Williamson.
Q. Did he furnish you in any way with that description.

A. Yes, sir; he put the numbers of the land down in Mr. Watkin's daybook.

Q. A little memorandum book he had with him?

A. Yes, sir.

Q. Who wrote it in there?

A. Mr. Williamson.

Q. Was the description of your piece written in there also by him?

1095 A. Yes, sir.

Q. What, if anything, was said about which pieces? Did anybody take you to the land and show you which pieces?

A. Well, when we found Mr. Williamson he was on the section that Mr. Watkins and his wife and Mr. Crane and his wife were supposed to take; and then he told us where we would find the piece I was to take, described it by a certain corner that was set beside the road, that we would see as we went back.

Q. Did you see it as you went back?

A. Yes.

Q. Found it from his description?

A. Yes, sir.

Q. Looked at the land?

A. Yes, sir.

Q. When did you go to town to file?

A. I think it was about the 18th of July; it was the next day after we was looking at the timber.

Q. Whom did you go before to file?

A. Mr. Biggs.

Q. Who was there when you went in to file?

A. Wilford Crane was there with me.

Q. He is a son-in-law of Watkins?

A. Yes.

Q. Was living on the same ranch you were?

A. Yes, we were both working for him at that time.

Q. Did you sign these two papers at that time?

A. Yes, sir.

Q. Did you swear to them?

A. Yes.

Mr. HENEY: I will offer these two papers in evidence. The same are received and marked Government's Exhibit 25 and 25a.

Q. At the time you went in to file on this claim, did you have any talk with Mr. Biggs about it?

1096 A. Yes, sir.

Q. Can you recall any of it? Just state all you remember of what was said.

Q. Well, I asked *in* him in regards to the filing, I didn't thoroughly understand it; and he told me that it was al- right, to go ahead, and I was laying myself to no obligations at all. He said the $75 I was to receive for the land over and above the expenses was for my benefit.

Q. At the time he said that had you read or had he read to you

this part of the affidavit "that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not directly or indirectly made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself"?

A. If I remember right, I did not read the filing papers at all; he read them over to *you*.

Q. He read it to you?

A. Yes.

Q. When he read that part of it to you, that you was to appropriate it in good faith for your own exclusive use and benefit, and so on, what was that conversation?

A. That was that time we had the conversation about the benefit I was deriving from the claim.

Q. Did you tell him what your understanding was with Dr. Gesner?

A. I had no understanding with Gesner at that time at all.

Q. Did you tell him what Watkins had told you?

A. Yes, sir.

Q. What was your intention as to what you would do with the land when you got it?

A. My intention was to turn it over to Williamson and Gesner when I got the title to it.

1097 Q. Did you tell that to Biggs.

A. Yes, sir.

Q. You told him you were going to turn it over to them for the $500?

A. I did.

Mr. BENNETT: We object to the question as leading.

Q. For what consideration did you tell him—did you tell him all that Watkins had told you?

A. Well, I don't remember whether I told him all that Watkins had said or not, but I give him the outlines, the way I understood it.

Q. Give it to us now as you gave it to him.

A. I told him I understood from Watkins that when we proved up on the land they was to pay us $75 for our right and was to furnish the money to prove up with; and he said that would be all right.

Q. I believe you stated it was your intention to convey it?

A. Yes, sir.

Q. Did you make final proofs afterwards?

A. No, sir.

Q. Did you see the notice published that you would make final proof?

A. Yes.

Q. You saw that in the paper, did you?

A. Yes.

Q. Why didn't you make final proof?

A. Well, for two reasons; one reason was I failed to get the money to prove up with——

Mr. BENNETT: I object to that.

Q. Well, if there was any talk with Gesner, is what I am getting at. Did you have any talk with Gesner before proving up or before the time came for final proof?

A. No, not before I went to prove up.

Q. When you went to prove up did you have any talk with Gesner?

A. I talked with him that day, yes, sir.

Q. Did you talk with Biggs first?

1098 A. Yes.

Q. What talk did you have with Biggs?

A. He said he had decided not to let any more prove up.

Q. Tell all you remember of that conversation?

A. And if we would go to Mr. Gesner he would pay us back our filing fee.

Q. What did you say to him?

A. I told him I would go and see Mr. Gesner, and I did.

Q. Did you say anything about proving up to Biggs? Did you say anything to Biggs as to what your wish was in the matter of proving up?

A. Not that I remember of.

Q. Do you remember of his giving you any other reasons than that you have stated? Did he say anything about why Gesner was——

A. I believe he said there was a disturbance about this land business, and they had decided not to prove up on any more claims until it passed over.

Q. You say you went to see Gesner? Where did you find Gesner?

A. I found him in his office.

Q. Was there anybody else there?

A. Wilford Crane and Mr. Williamson.

Q. Was Wilford Crane with you when you were in Biggs' office?

A. Yes, sir.

Q. Now in Gesner's office who else was there besides Crane and Gesner?

A. Mr. Williamson.

Q. What talk took place there?

A. Well, we talked with Mr. Gesner about proving up on the land, and he said he was sorry that we couldn't go ahead, but he thought that after this scare was over we would be able to go ahead and prove up on the land. And Mr. Williamson was reading the Oregonian, and he read a little sketch out of it where Mr. Hitchcock was raising kind of an excitement over this land business.

1099 Q. Can you remember the substance of any that he read?

A. No, I don't.

Q. Do you remember anything else that was said there?

A. No, I don't recall anything else to mind now.

Q. Do you remember anything being said about it not being safe to go ahead then.

Objected to as leading.
Objection overruled.
Defendants except.

A. Why, I don't remember whether that was all there in Gesner's office, or whether it was spoken of in Biggs' office.
Q. Was it spoken of in one place or the other.

Same objection. Same ruling. Same exception.

A. That is my impression that it was, but I would not say positively.
Q. Did you get the money back for your filing fees?
A. Yes, sir.
Q. Who gave it to —?
A. Mr. Gesner gave me a check for it on the Prineville Bank.
Q. Did Crane get his?
A. Yes.
Q. Did you see him get it?
A. Yes, sir.
Q. How did he get his?
A. He got it by check the same as I did.
Q. Was that right there in the office?
A. Yes, sir.
Q. Was Williamson present?
A. Yes, sir.
Q. How were the checks signed?
A. I think by Williamson and Gesner.
Q. Was it on a Prineville Bank?
A. Yes.
1100 Q. Did you cash it?
A. I did.
Q. The same day?
A. Yes.
Q. Did you see Crane cash his?
A. No, I did not see him cash his.
Q. On that day did you relinquish before or after the talk with Gesner?
A. Afterwards.
Q. Is that your signature?
A. Yes sir.
Q. Did you have any further talk with Biggs when you went back to relinquish?
A. Not that I remember of.

Mr. HENEY: We will offer this paper in evidence, dated December 8th, 1902.
Same was received and marked Government's Exhibit 26.
Adjourned until 9.30 A. M. tomorrow morning, September 12th.

1101 PORTLAND, OREGON, *September 12th*, 1905—9.30 a. m.

GEORGE M. GAYLORD resumes the stand.

Cross-examination.

Questions by Mr. BENNETT:

—. Mr. Gaylord, how long have you been living at Sweet Home this last time?

A. I went there this last time last fall.

Q. You have been living there since?

A. Yes, sir.

Q. Now, you were working for Mr. Watkins were you, at the time that — filed on a timber claim?

A. Yes, sir.

Q. How long had you been working for him?

A. Why, I had been with him for about two weeks.

Q. Now he told you one day that he and his wife, and his son-in-law and his son-in-law's wife were going to take up a timber claim, and wanted to know if you didn't want to take one, didn't he?

A. Yes, sir.

Q. You went up with him to the shearing plant?

A. Yes, sir.

Q. And when you got up there you found Mr. Williamson and Dr. Gesner up there?

A. Not at the shearing plant.

Q. Well, you saw them before you got to the shearing plant?

A. No, sir. We got to the shearing plant first.

Q. Oh, you got there first; they weren't there?

A. No, not at the shearing plant.

Q. Then they came a while after you got there?

A. No, sir. We saw them over on Horse Heaven Creek, after we left the shearing plant.

Q. How far was that from the shearing plant?

A. I should judge about seven or eight miles.

1102 Q. How long did you stop at the shearing plant before you went on over to Horse Heaven Creek Country?

A. How is that?

Q. How long did you stop at the shearing plant before you went over to the Horse Heaven Creek Country?

A. We stayed there over night.

Q. When you got over to the Horse Heaven country did you find them surveying over there?

A. How is that?

Q. Did you find them surveying over there when you got over to the Horse Heaven country.

A. Why, they had been surveying and they was camped for dinner when we got there.

Q. They were camped on the land they had been surveying?

A. Yes, sir.

Q. And who all were there?

A. Well, there was Williamson and Gesner and Charley Graves.

Q. That is the County Surveyor?
A. Yes, sir. And Henry Beard.
Q. Now, you told them what you had come for, did you? That is some of the crowd told them what you had come for?
A. Yes, sir.
Q. And somebody in their crowd said that they had just been surveying that section, and that that was good timber land, did they? As good as any other?
A. Well, they said that; about the same as what timber we could see.
Q. Yes, just about the same. And did some one there show you where the lines on that section were, about, as they had surveyed it?
A. Well, they told us that was about the center of the section.
Q. Did they show you the lines, or corners?
A. They showed the corner, I believe, to Mr. Watkins.
Q. Did show the corner to Mr. Watkins?
A. I think so.
1103 Q. Mr. Watkins did the main part of the talking?
A. Yes, sir.
Q. And they told Mr. Watkins and his son-in-law, if they wanted to take that section they could?
A. I think so.
Q. Then Mr. Watkins said something about your taking a claim, or wanting to take a claim?
A. Yes, sir.
Q. And then Mr. Williamson, you think, wrote down the numbers of another quarter section on the road, farther back, that you could take if you wanted to?
A. Yes, sir.
Q. And now do you remember how Mr. Williamson came to write the numbers in the book? Wasn't Dr. Gesner going to give you the numbers and write them in the book, and wasn't there something said about that he couldn't write very well, or something to that effect?
A. Not that I remember of now.
Q. You don't remember whether that was said or not?
A. No, sir.
Q. Mr. Watkins was doing the main talking, wasn't he?
A. Yes, sir.
Q. He was the spokesman on the part of your company?
A. Yes, sir.
Q. He is here as a witness?
A. Mr. Watkins?
Q. Yes.
A. Yes, sir.
Q. Subpœnaed by the Government?
A. Yes, sir.
Q. And it was Mr. Watkins' book, was it?
A. Yes, sir.
Q. That the numbers were written in of all five quarters?
A. Yes, sir.

Q. Now, you didn't have any talk with Mr. Williamson or Gesner up there, about any loan or money or what was to be done with the claim, or anything of that kind, at all, did you?

1104 A. No, sir.

Q. Not a word?

A. No, sir.

Q. The only talk that you ever had with anybody about that, prior to your filing, was with Mr. Watkins?

A. Yes, sir.

Q. Now you say, in your testimony, that he told you that Gesner and Williamson would loan the money. Now did he loan the money of the firm of Gesner & Williamson?

A. Yes, sir.

Q. Now, don't you know that there was no such firm at that time at all?

A. No, I don't.

Q. Don't you know the firm was Gesner, Wakefield & Williamson, or Williamson, Wakefield & Gesner?

A. No, I don't know anything of the kind.

Q. What say?

A. No, sir, I don't know as I remember anything of the kind; of hearing Wakefield's name spoken of at all.

Q. Well, now don't you know that there was no such firm in that country, and nobody at that time, ever spoke of it as Williamson & Gesner, but it was Williamson, Wakefield & Gesner?

A. No, I don't know it if it was.

Q. Well, don't you know that Williamson & Wakefield had been in the sheep business long before Gesner had anything to do with it?

A. No, sir. I wasn't aware of the fact.

Q. And that the firm that was known through all that country as Williamson & Wakefield, and then when Gesner went into the firm, just a short time, a year or such a matter, before these lands were filed upon, the firm became known as Williamson, Wakefield & Gesner, that is, Gesner's name was added to the firm? Don't you know that?

A. I wasn't aware of the fact.

Q. Will you undertake to say that Watkins told you that it was the firm of Williamson & Gesner that was going to, whether

1105 there was any such firm or not?

A. That is the way it was stated to me; there was no Wakefield mentioned.

Q. No Wakefield mentioned at all?

A. No, sir.

Q. When you came to make your relinquishment, you say that you went to Biggs first, at the time you made your relinquishment, about proving up time you went to Biggs and had a talk with him first, before you had any with Gesner, did you?

A. Wilford Crain.

Q. At the first talk with Biggs?

A. The day that I went to prove up?

Q. Yes.

A. Yes, sir.

Q. Well, I thought you said, a while ago, that you went and had a talk with Biggs, and that when you went down to Gesner's office, Crain was there. Now, I want to find out about that. Did you mean that he went down there with you, or that he was there when you got there?

A. He went there with me.

Q. Did you and Wilford Crain, as you claim, go to Biggs' office together?

A. Yes, sir.

Q. You went to Biggs' office together?

A. We went to Biggs' office together, and we also went to Gesner's office together.

Q. Then you went from Biggs' office down to Gesner's office together?

A. Yes, sir.

Q. And you had a talk with Gesner and got your money down there, your checks?

A. Yes, sir.

Q. Both of you?

A. Yes, sir.

Q. And then you went back up to Biggs' office did you?

1106 A. No, I didn't go back to Biggs' office after, to talk anything to him as to my timber claim. I went as a witness when John Watkins proved up on his.

Q. I understand you, in your direct examination, to testify that you didn't relinquish until after you went down and got your money from Gesner. What I am getting at, after you went down and got your money from Gesner, did you go back to Biggs and relinquish, you and Crain, or had you relinquished before you went down to Gesner at all?

A. I would not say positive whether I had signed the relinquishment papers before I went after my money from Gesner or not.

Q. Well, you testified in your direct examination that you went to Biggs' office, then went down to Gesner's office and got your money, you and Crain, or at least you found Crain there, and got your checks, both of you, and then you went back up to Biggs' office and relinquished, didn't you?

A. I don't remember whether I testified that way or not.

Q. Any way, this time when you claim to have seen Williamson there was the time when the checks were made out to you and Crain?

A. The time that I saw him at Gesner's office?

Q. Yes, when Williamson was there, and you claimed he read something to you in the paper?

A. Yes, it was the same time that the checks was made out.

Q. Now then, you say you went right up to the bank and cashed your check?

A. Yes, sir.

Q. Did Crain go with you?

A. I don't remember whether he went into the Bank with me or not. We walked up the street together.

Q. Walked up to the bank together?

A. Yes, sir.

Q. You don't remember whether he went into the bank and cashed his check or not?

A. No, I couldn't say now.

1107 Q. Now, that all happened the same day you relinquished, did it? The same day that you relinquished?

A. Yes, sir.

Q. You are sure about that; whether it was before or after, it was all the same day, you claim?

A. It was the same day.

Q. Now weren't these checks signed by the name of Williamson, Wakefield & Gesner, by Gesner?

A. I don't remember whether Wakefield's name was on the check or not but I don't think it was.

Q. Don't think it was?

A. No, sir.

Q. Are you just as certain about that as you are that Williamson's name was mentioned by Watkins to you before you went up to the mountains?

A. No, I wouldn't say positively that it wasn't there, nor I wouldn't say it was.

Q. You never talked with any of the defendants since you have been down here as a witness?

A. No, sir.

Q. Nor with any of their attorneys?

A. Nothing—Well, I did have a few minutes' talk with Mr. Biggs out here but nothing in regards to this.

Q. Nothing in regard to the case?

A. No, sir.

Q. You just met him casually and passed the time of day?

A. Well, we had a little conversation on some private business.

Q. It didn't have anything to do with this case?

A. No, sir.

Q. You were told by Mr. Neuhausen not to go around the defendants or have any talk with them, weren't you? This gentleman who sits over here?

A. I don't remember of Mr. Neuhausen telling me not to go around them.

1108 Q. Didn't he tell a number of the witnesses, among whom you were, not to go around them, or talk to them.

A. I couldn't say as to that; he might have told others several things that he didn't tell me.

Q. Well, didn't you testify in the first trial of this case, in answer to the question—

"You were told by Mr. Neuhausen not to talk with the defendant or their attorneys? A. Not personally, no. Q. Not personally? A. No. Q. What do you mean by that? Do you mean that you were told in some way? A. He didn't tell me individually? Q. What do you say? A. I mean that he didn't tell me individually. Q. But he told a number of people of whom you were one, didn't he?"

And did you answer, "yes sir?"

A. I don't remember whether I did or not.

Q. Well, is it true that he did tell a number of people of whom you were one?

A. How is that?

Q. Is it true that he did tell a number of people, of whom you were one?

A. Not that I remember of.

Q. You don't remember that one?

A. No, sir.

Q. Now, you have talked with Mr. Neuhausen a good many times, haven't you, about the case?

A. Why, I did when I first came down here.

Q. Did you talk with Mr. Burns a good many times about it?

A. Not very many, no; very little.

1109 Q. How many times with Mr. Burns?

A. Oh, I couldn'- say.

Q. Mr. Burns and Mr. Neuhausen are assisting the government in the case, aren't they?

A. Yes, I think so.

Q. Now, at the first trial of this case, were you asked this question? "No, I don't know as I told anybody I would sell it. Q. You just had in your mind an idea that probably you would sell it? A. Of course that was the impression. Q. But you didn't tell anybody about that? A. No. Q. Nor agree with anybody that you would? A. No sir."

Did you so, testify at the first trial?

A. I think so.

Redirect examination:

Q. Now, following that testimony that has just been read to you, weren't theses questions asked you by Mr. Bennett on cross examination in the other trial, and didn't you make this answer?

"Well, why were you particular then about waiting, or having an idea of selling to these particular people if you could sell to anybody?"

Mr. BENNETT: Do you mean immediately following?

Mr. HENEY: Following after half a dozen other questions; about three or four. I will read them all. I don't know just where you stopped.

"Now the reason you expected to do that" (that is to sell to Williamson & Gesner) was because they were the only ones that would buy it, you thought, didn't you? A. No, they wasn't the only ones that would buy it. There was plenty of them out there that would buy it. Q. Out there at that particular place? A. Any of them that they could get. Q. Who was there then that would buy timber claims? A. Well, there was several different companies in there; I couldn't cell their names. Q. Buying timber land in that particular locality? A. All around it; yes. Q. Well, why were you particular then about waiting or having any idea of selling to these particular people if you could sell to anybody? A. Well, simply because it was in a location where they was locating their claims,

and I had no desire to go in there and take up a claim and
1110 make it appear like I was doing it for spitework. Q. And that is the reason you felt under some obligation to sell to them, because it was in their range, and if you went in there and get it and sold it to somebody else, it looked as though you were interfering—butting in? A. Well, yes, in one sense of the word it looked that way. And then another thing, I was with a man that they had got to go and take land. Q. Well, did that make any difference? A. Well, I don't know as it would make any particular difference, and still it would make a difference too. Q. You were simply taking a timber claim to get all there was in it for you, weren't you? A. Sure. Q. Well, couldn't you have taken a timber claim some where else and got more out of it? A. I don't know whether I could or not. I didn't make any inquiries. Q. Could you have got more out of that claim by selling it to somebody else? A. No, I think not. Q. Well, if you could have got more, if somebody else had come along and offered you $1000 for that claim, you hadn't agreed that you wouldn't sell it to them, had you? You hadn't told anybody that you wouldn't? A. I don't know as I had told anybody right out in plain words that that was the intention, but that was a kind of an impression—the understanding that I had with the man that I went with. Q. An understanding that you had with Watkins? A. Yes. Q. Without any words? You didn't tell him so, or anything of that kind, but you had an understanding in your own mind. Now, sir, isn't this the fact, that the only obligation that there was on you in any way or that you felt on you in any way, was that you thought it would be rather a decent thing, if they loaned you the money, as long as it was right there, for you to sell it to them? That was about the size of it, wasn't it? A. Well, I expected there could be more than one way of putting that question. Q. What say? A. I expect there is more than one way of putting that question, to get different meanings out of it. Q. Well, can't you answer the question? A. Well, yes. Q. You say you had no contract when you went to Mr. Biggs; you told him that you hadn't made any contract, didn't you, when you were talking the matter over?"

Mr. BENNETT: Well, now, I think that has reference to another matter.

Mr. HENEY: No, it is this very matter.

"A. I don't remember telling Mr. Biggs any such thing. Q. When you were asking him about his advice in relation to the matter, didn't you tell him what the facts were—that you hadn't made any contract in relation to it? A. I don't think I did. Q. You don't claim that you told Mr. Biggs anything about what your secret intentions were; about what you were going to do with the land"——

Mr. BENNETT: I object to that as not proper re-direct examination, and incompetent and immaterial, not having any reference to
the matter about which we asked the witness in relation to
1111 the testimony at the other trial.

COURT: Your cross examination was for the purpose of showing that he testified differently at the preceding trial?

Mr. BENNETT: These are just the questions that we asked, your Honor, in relation to that:—

"No, I don't know as I told anybody that I would sell it. Q. You just had in your mind an idea that probably you would sell it? A. Of course that was the impression. Q. But you did not tell anybody that? A. No. Q. Nor agree with anybody that you would? A. No, sir.

Now what we were asking him was the fact; now they are proceeding to cross examine about what he told Mr. Biggs.

Mr. HENEY: And that wouldn't be the fact?

Mr. BENNETT: It is another fact probably, but it wasn't the fact that we were asking about, and they cannot put in his testimony at another trial, except in relation to the matter about which we have asked him.

Objection is overruled. Defendants except.

Mr. HENEY: "I think I gave Mr. Biggs to understand that my intention was, if I proved up on the timber claim, that it would go to Williamson & Gesner. Q. What did you say to him about that? Did you say anything to him about that? Do you claim that you did? A. Yes. If I hadn't said anything to him about it, there wouldn't have been nothing said about the money that I was to get to prove up on it. Q. The talk you had with him, was about money was it? A. The money was to come from Mr. Williamson and Gesner. Q. Do you claim that you had that talk with Biggs at the time you applied for it? A. At the time I filed. Q. Yes? A. Yes, sir. Q. At the time you filed your application, not at the time you were talking about proving up, but at the time you filed your application? A. At the time I filed my application. Q. What did you say about that? A. Oh, I don't remember now just the conversation. Q. You don't remember what you did say. Now, when you got up there where these people were, who were present?

That goes off on to another subject. Now, then on redirect examination on that same subject, didn't you testify this way?

"You told Biggs at that time, before swearing to this application, did you not, that Watkins had told you that Williamson and Gesner were willing to put up the money on condition that you deeded the claim to them for $500 as soon as you got title? A. Yes, sir.

1112

Mr. BENNETT: We object to that as incompetent, hearsay, and not connected with any matter that he was asked about in cross examination in any way.

Mr. HENEY: They asked him if he didn't testify on the former examination that he concealed this intention; that he never expressed it to anybody; now this is other testimony given by him on the former examination which bears directly on that question.

COURT: Was that testimony admitted on the former trial?

Mr. HENEY: Yes.

COURT: Go ahead.

Mr. BENNETT: We take an exception.

Mr. HENEY: There was an objection, and then the question.

"Did you tell him that? A. Yes. Q. You asked him if, under these conditions, you had a right to sign that and swear to that? A. Yes, sir. Q. And he told you that he had because the land wasn't worth only the $75 more than it was costing from the Government and therefore you were taking it wholly for your own interest. Is that right? A. That was the impression."

Q. Now, if you had been taking up a claim to hold it for speculation, would you have taken this claim?

A. No, sir.

Q. Why not?

Objected to.

A. Because it was not such a claim as I would have wanted.

Objected to as incompetent and immaterial.

Objection overruled.

1113 Defendants except.

Q. How did you get to the point where you found Williamson and Gesner where they were having their lunch. You say they were having lunch when you got there. Dinner at noon?

A. Yes, sir.

Q. How did you get there?

A. Why when we left the shearing plant Henry Beard told us where to go to find them.

Q. I mean, did you go a foot in a wagon or how?

A. We went in a wagon.

Q. Did you drive all the way to it?

A. Yes, sir.

Q. Was there a road running to it?

A. Just a kind of a by-road where they had been using, going in and out with their sheep supplies.

Q. Could you drive in there anywhere with a wagon without a road?

A. Yes, sir; most of the way.

Objected to as immaterial and incompetent.

The COURT: I don't suppose that is immaterial. It does not appear to be now.

Mr. HENEY: He stated that they were told that the land on that section was practically the same and as good as any around there. Now I want to show what the character of that land was they were taking up for timber purposes?

The COURT: I think that would be competent; but whether you could drive through with a wagon, has that any materiality as to the fitness of the land for timber purposes?

Mr. HENEY: It speaks pretty loudly to a man who is in the habit of going through timber country as a fact bearing upon the question. Well, I will withdraw the question if your honor has any doubt about it.

1114 Q. Would you recognize the place where you were and do you recognize it in those photographs, or could you tell?

A. I don't know from a photograph of it whether I would or not. They don't look natural to me like the country would if I was there.

Q. Does that look more natural?

A. Yes; that looks more like it.

Mr. HENEY: The photograph that the witness says looks more like it is marked "Identified by George M. Gaylord, September 12th, 1905.

Q. Did you see (showing the photograph that you say looks more like it) did you see any timber there that was any larger sized than that in the photograph?

Mr. BENNETT: We object to that as immaterial and incompetent. All this matter in relation to the timber on the land was ruled out by Judge De Haven and it seems to me with entire propriety. We are not charged with making any false statements in relation to the timber matter. Indeed it is alleged in the indictment that these lands were more valuable for timber than for any other purpose. That is, it is alleged that they were open to filing under the timber laws, and it would necessarily follow if they were open to entry under the timber laws that they were chiefly valuable for timber.

The COURT: I do not suppose it is offered for that purpose. I take it it is offered for the purpose of tending to show that the land was taken up for the use and benefit of a person other than the applicant and that its relevancy is in that direction. If the applicant were taking it wholly for his own benefit that he would not have taken up that particular piece of land and for that purpose, I take it the offer is made. Am I right?

Mr. HENEY: That is the purpose, your Honor.

Objection overruled. Defendants excepted.

Q. Was there any timber there larger than that appears to be?

A. Yes; there was some.

1115 Q. How much?

Mr. BENNETT: Same objection. Of course, our objection goes to all of those.

A. There was no great sight of large timber there.

Q. How was that section as to whether it was open or not and as to grass?

A. Well, it was pretty fair grass range.

Mr. BENNETT: Same objection, of course, to all this.

The COURT: The objection applies to all this testimony on this head.

Q. How was it as to openings?

A. Why it is all open timber. There was no underbrush, only just once in a while a little pine thicket—something of that kind.

Q. You were asked by Mr. Bennett whether they said to you up there in the timber that you could take that section if you wanted to. Now just exactly what was said about that?

A. You mean that Watkins and his——

Q. Yes.

A. Why they told them that they could take that section if they wanted it—section 24.

Q. Who said that?

A. I think Mr. Williamson was talking then.

Q. You don't mean that those were the exact words he used, do you, or is that the substance, or those the exact words, or can you remember?

A. That is the nearest I remember it.

Q. How long had you been there before you went to work for Watkins?

A. You mean at Prineville?

Q. At Prineville?

A. Why, something like two years,—two and a half.

Q. During that time and during the time you were up in the timber and about the time of these filings and up to the time
1116 of final proof, did you hear anybody refer to that shearing plant as to whose it was—anybody besides Watkins?

A. Why, yes; I heard several around the country speak of it.

Q. And what did they call it?

A. It was called Williamson's shearing plant.

Q. Now you say during a conversation with Mr. Biggs here. When was that with reference to the first trial?

A. I don't remember. It was along towards the last of the trial. Just a day or two before I went home.

Q. The first trial or the second?

A. I think it was the first one. I wouldn't be certain.

Q. Was it after you had testified?

A. Yes, sir.

Q. What did Biggs say to you?

A. Why he spoke to me about a little matter out here at Prineville. He said it had been put in his hands for collection.

Q. Is that all he said? Tell all he said frankly?

A. Why I don't know as I can recall all the words that he used just as he used them.

Q. Well, give the substance of it.

A. The substance of it was that they wanted a settlement and that right away.

Q. Right away? Was it some money you were owing?

A. Yes, sir.

Q. To whom?

A. Mrs. McDowell.

Q. Had you had any arrangement with her before that about it?

Mr. BENNETT: We object to that, your Honor, as being immaterial and incompetent. I suppose we cannot go into the matter. I suppose they can go in- the conversation with Mr. Biggs if they want to, at least we have no objection; but I don't suppose they can go into the arrangement with Mrs. McDowell.

The COURT: Not unless it was known to the defendant, Biggs.

Q. Did you tell Biggs about any arrangement you had with her?

1117 A. I told him I had given her a chattel mortgage on some horses as security for the account.

Q. That you had given?

A. Yes, sir.

Q. Did you tell him anything about as to whether she had said anything in regard to when it should be paid?

A. Not that I remember of.

Recross:

Q. You have told everything that was said now, have you?

A. How?

Q. Have you told everything that was said between you and Biggs now at that time?

A. I don't remember whether there was anything more said or not.

Q. You have told all you remember, have you?

A. Well, I don't call anything else to mind now.

Q. Mr. Biggs told you that Mrs. McDowell had placed an account in his hands for collection, did he?

A. Something to that effect.

Q. How much was it that he said that he had against you that Mrs. McDowell had placed in his hands?

A. I don't know as he said right at that time what the account was. I got a statement from her just a few days before that stating what the account was.

Q. Did you tell him how much it was. Was it talked over between you and him?

A. Not that I remember of.

Q. Mr. Biggs did not say a word in reference to this case at all in any way at that time?

A. Not that I remember of now.

Witness excused.

And the defendants having offered testimony tending to show that the grass was not very good and that the chief value of the land was for the timber; in rebuttal the Government called one, THOMAS M. O'CONNELL, who testified that he was a timber cruiser, and

1118 that he had examined the land in question, was asked the following question, "Now then how does the timber in 15-19 compare with the timber in 15-20 in a general way"?

To which the defendant objected as not being proper rebuttal immaterial and part of the Government's direct case. But the objection was overruled and the defendants excepted.

Whereupon the witness answered, "Well, 15-20 is better timber. And thereupon the witness was asked and answered the following questions subject to the same objection, ruling and exception. "Q. How does the timber in 15-19 compare with the timber in 14-19? A. Well, what I done in 14-19 I think that is better. Q. Did you

locate anybody in 15-19? A. No, sir. Q. Did you attempt to? A. No sir. Q. How does that 15-19 compare with the other townships that you mention that you have cruised there? A. Well, I didn't do very much work in that town. I have been across the town. Q. What is the character of the timber in a general was as you found it in going across the town? A. Well it was short and very scattering, of a coarse nature."

The following is all of the testimony of the aforesaid witness Thomas M. O'Connell, introduced at the trial.

THOMAS M. O'CONNELL, called in rebuttal on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. HENEY:

—. Mr. O'Connell, where do you live?

A. Well I live on a homestead north of Prineville when I am at home.

Q. And what business are you in? Are you the keeper of——

A. Well, I have been looking land and locating timber claims.

Q. How much experience have you had in cruising timber?

A. Oh, practically all of my life.

Q. And how much of that time in Oregon?

A. Six years.

Q. And what township- have you cruised through in the Prineville vicinity?

1119 A. Oh, ten or twelve different townships.

Q. Will you name some of them?

A. Yes.

Q. What are they?

A. 12-16.

Q. Name all that you can think of.

A. 11-16, 11-18, 12-18, 11-17, 12-17, 13-17, 13-16, 12-20, 12-19, 13-19, 13-20, 14-20, 15-20, 15-21, 14-18, 15-18; that is, there is a few towns that I didn't cruise; that is, I didn't locate any people in those towns.

Q. Some of those that you mentioned you cruised through but didn't locate any people in them?

A. Yes, sir.

Q. Is that what you mean?

A. Yes, sir.

Q. Did you cruise through 15-19?

A. No.

Q. Did you go into 15-19 at all?

A. I cruised the north side of 15-19 and was into 15-19.

Q. How far did you go into 15-19?

A. Well I ran the line accross 14-19 and 13-19, and into 14-18 and 15-19.

Q. Now can you tell where you entered 15-19 or whether you went cross it any?

A. Well, no; I don't believe that I can exactly. I know where I started in to go into that country.

Q. Where?

A. Well, it was on the section corner—the south east corner of 14 and the southwest corner of 13.

Mr. BENNETT: I suppose that is all preliminary. I have been waiting—it seems to take a good while for the preliminary and I will probably save time by presenting our objection now. We object to this as not proper rebuttal and as having been fully gone into in the main case.

1120 Mr. HENEY: We were not allowed in the main case to go into a comparison of 15-19 with other townships there. They did not go into that when Mr. Williamson was on the stand in particular; now we want to rebut the testimony of Mr. Williamson, his comparison of the timber in 15-19 with the surrounding townships.

Objection overruled.

Defendants except.

Q. Did you go through 15-19, Mr. O'Connell?

A. Yes, sir.

Q. Now then, how does the timber in 15-19 compare with the timber in 15 20 in a general way?

Objected to as not being proper rebuttal; improper and immaterial and part of the Government's direct case.

COURT: You can let your objection apply to all this testimony and I consider it as applicable to all of it, and overrule the objection as to it.

Mr. BENNETT: Very well; we take an exception.

COURT: Point that out, Mr. Heney.

Mr. HENEY: 15-19 is this one, Horse Heaven range; and 15-20 is the adjoining township.

Q. You have been across 15-20.

A. I have been in there, yes, sir.

Q. How does the timber in 15-19 compare in a general way with 15-20?

A. Well, 15-20 is better timber.

Q. How does the timber in 15-19 compare with the timber in 14-19.

A. Well, what I done in 14-19 I think that is better.

Q. Did you locate anybody in 15-19?

A. No, sir.

Q. Did you attempt to?

A. No, sir.

Q. Did you locate anybody in 15-20?

A. No, sir.

Q. Did you try to?

A. Well, I did if I could have got applicants for it.

1121 Mr. BENNETT: We object to that as being immaterial and incompetent in addition to the general objection.

Mr. HENEY: Let that go out then. We don't care whether he did or not.

COURT: Let it go out.

Q. How does that 15-19 compare with the other township- that you mention that you have cruised there?

A. Well, I didn't do very much work in that town; I have been in across the town.

Q. What is the character of the timber in a general way as you found it in going across the town.

A. Well, it was short and very scattering, of a coarse nature.

Cross.

Questions by Mr. BENNETT:

Q. When was it you cruised these townships in that vicinity, Mr. O'Connell?

A. Well, the first work I done in 15-19 was somewhere along the middle of June three years ago.

Q. That was in June, 1902?

A. Yes.

Q. And how long did you stay there then?

A. Oh, I didn't stay there long enough to walk along the lines and walk around through the country and take a general observation of it, that was all.

Q. When did you ever come back there again?

A. Oh, I have been back there several times since.

Q. When was the next time you were back there?

A. It was in July.

Q. When was the next time you were back there after that? Did you walk around through the country there in July?

A. Cross the country several times.

Q. Just walked across the country?

A. Yes, sir.

Q. When were you back there again?

1122 A. I was in there last fall.

Q. Last fall? In there cruising last fall?

A. Not cruising in that particular town.

Q. Was there somebody ahead of you cruising in that country when you went in there at the first place?

A. At the first, no, there was not.

Q. Was there at the second time?

A. Yes, sir.

Q. There was somebody ahead of you? Who was that?

A. I couldn't say who they were.

Q. You found there was somebody ahead of you in that country?

A. Yes, sir.

Q. Ahead of you in township 15-19?

A. Yes, sir.

Q. And pretty much all of that country was taken up wasn't it, it was filed on.

A. I don't know as to that.

Q. But you know there was somebody in there ahead of you.
A. I don't know—know there was work done in there—I didn't go in there to do work particularly in that town.
Q. Who was it working in there ahead of you?
A. I could not tell you.
Q. For whom were you cruising that country?
A. For myself
Q. That is, you were cruising to get information upon which to locate people?
A. Yes, sir.
Q. Charge them $100 a piece?
A. Yes, sir.
Q. And point out the lines to them?
A. Yes, sir.
Q. And the corners?
A. Yes, sir.
1123 Q. Make selections for them?
A. Yes, sir.
Q. Were you working in connection with any Eastern parties in relation to the timber lands?
A. No, sir.
Q. Were you promising these people that you located that you would find them purchasers?
A. No, sir.
Q. Were you giving them any information to purchasers?
A. No, sir.
Q. Or as to who would probably purchase it?
A. No, sir.
Q. Were you telling them how much the timber claims were worth?
A. I was not.
Q. Wasn't doing anything of that kind at all?
A. No, sir.
Q. How long did you say you had been in the business? What section did you say you went into, 15-19 on?
A. I went in from 14.
Q. You went in from 14?
A. I went in from 14-18 down into 15-18 on the range line between 14-18, 15-18, 14-19, and 15-19, started from the section corner.
Q. You ran this township line down there did you?
A. Yes.
Q. Where did you start?
A. I started from the corner of section 14-13, 24 and 23.
Q. That was here.
A. Yes, sir, right from the county road.
Q. 14-13? Well, that wouldn't be on the township line *was* it?
A. I didn't say 14-13. I said 14-19. 14-18, 14-19, 13-19, 14-19, 15-19, and 15-18.
Q. Where did you start in on 15-19 and 15-18; down here or up here?

A. I started from the corner—section corner—of 24; 23, 13, and 14; 14-18—14-19 I mean to say south.

Q. But I am asking you where you started on this par-
1124 ticular line—this is 15-18?

A. I started one mile from the range line.

Mr. HENEY: He says in 14-19 at the corner of sections 24 and what others?

A. 23, 24, and section 13 and section 14.

Q. I am not asking about 14-19, I am asking him where he first struck these two townships, being 15-18 and 14-19; as I understand you ran the township line between them. Now where did you strike that township line?

A. I struck it pretty close to section 18 in 15-19. I quit the line before I got into—and was taking a meandering survey through the country.

Q. In here somewhere, then?

A. Somewhere in there; yes.

Q. Then you didn't run a line down from here?

A. I ran the line south.

Q. From the north-east corner?

A. I ran the line south and then I made it jog. I made a jog back into the township line. When I started in I started in one mile west of the range line and then I made a jog in I don't know how far it was, I don't remember just what corner I started in on; but I made a jog back to the east fetching me back on the range line between 18 and 19.

Q. This range line between 18 and 19?

A. Yes, sir.

Q. Now you think you commenced a mile the north east corner of section 15-18 a mile west?

A. A mile west; yes, sir.

Q. From the north east corner?

A. Yes, sir.

Q. And you ran down here two miles?

A. No; I ran down in there, I don't remember how far. I wasn't paying any attention to the corners particularly, as I went to them; I was compassing along the line.

1125 Q. Then from somewhere along here you ran over to the township line?

A. I think I did I ran about a mile and a half south and then I jogged towards the range line again.

Q. To about the middle of section 12 that would be?

A. Oh, no, that would be a way down in 25, section 25, wouldn't it? 24?

Q. Don't you know from your experience as a ranger that a mile and a half from the township line takes you down to the middle of section 12?

A. South? 13 is south of 12 isn't it?

Q. Yes. 13 is south of 12.

A. Well, section 14 is west of section 13 isn't it?

Q. Yes.

A. Well, if I went a mile and a half south where would I be?

Q. Now look here you started from the township line and ran down one mile, that would be within section 1 and 2 wouldn't it? You would run a mile between section 1 and 2 wouldn't you?

A. I couldn't go south and get into section 2.

Q. From the township line?

A. No, going south, no.

Q. Well isn't section- 1 and 2 just south of the township line?

A. No, sir.

Q. If you start a mile west from the northeast corner of the township wouldn't you be at the corner of 1 and 2?

A. I told you the corner I started from. I told you the four corners I started from. I started from the corner of section 13, the northwest corner of 13, the northwest corner of 14—no, it was 24 and 23.

Q. The northeast corner of 24 and the northwest corner of 23.

A. I started from the northwest corner of 13 and the northeast corner—the northwest corner of 14.

Q. The northwest of 13?

1126 A. Well, I don't know exactly.

Q. And the northeast of 14.

A. Yes, sir.

Q. Well, that is 2 miles from the township line, ain't it, that is 2 miles south of the township line?

A. Section 13 and section 12, yes.

Q. Then you did run south from the township line 2 miles, did you?

A. I was 3 miles south from it.

Q. Then that would take you to the corner of 23 and 24 wouldn't it?

A. Well, exactly. I told you where I started from in the first place.

Q. You ran 3 miles south from the township line to the corner of 23 and 24?

A. I don't remember how many miles I went south, anything of the kind. I went down and ran that line. I said I went down on that line.

Q. A while ago you said you ran a mile and a half south.

A. I said I ran a mile south and went clean down into the road clean down to the county road was where I was going to. I didn't aim to pick up any corners or quarter posts or any thing of the kind only to take a view of the country as I was going into it.

Q. When you got down here to the corner of 23 and 24 you jogged right across to the range line, didn't you?

A. Yes, sir.

Q. Then you would strike the range line at the corner of 13, 18-19 and 24 wouldn't you?

A. Well, I struck in, I don't remember, as near as I could remember, I was in on section 18, as near as I could figure at that time.

Q. Well, where did you go from there?

A. I took a scoot across the country.

Q. Which way?

A. I went east over into the Horse Heaven country.

Q. How far east did you go from there?

1127 A. Well, I went over to a place and camped that night at a place that was called the Pollard place, the old Pollard place that was on Horse Heaven creek as it was told to me.

Q. About how far was that across the country from this range line?

A. Oh, I should think it was three miles from what they call the sheep-shearing camp.

Q. Oh, you went across?

A. I came out to the sheep-shearing camp.

Q. Then you went about three miles in which direction?

A. East.

Q. East three miles, and then where did you go?

A. I went out to that creek as I said, Horse Heaven Creek, and camped all night.

Q. Where did you go the next morning?

A. Well, I went on north.

Q. Due north?

A. Pretty nearly.

Q. To the township line?

A. Well, I don't know I wasn't on any line at all the next morning.

Q. On that trip did you go back on 15-19 any more?

A. Not at that trip, no.

Q. You went on up further north, did you?

A. Yes, I camped out on the Ochoco road.

Q. Camped down on the Ochoco road?

A. Yes, sir.

Q. The next time when you went back in July where did you strike 15-19?

A. I struck it somewhere near the sheep camp. I don't remember; I don't know just exactly where the lines are.

Q. Where did you go from the sheep-shearing plant that time?

A. I went off into 15-20.

Q. You went up the road from Prineville to the shearing camp did you?

A. I went up to Smith's place and went up to what is called Veazie Creek.

1128 Q. That is the road from Prineville up to the shearing plant, is it?

A. Yes, sir that is the road.

Q. When you got to the shearing plant you staid there all night, did you?

A. Yes, sir I staid two nights at the shearing plant.

Q. What were you doing? Cruising around there?

A. No sir?

Q. Just staying there?

A. Staid in there as I went in there, and staid there as I came out.

Q. Oh, you mean as you went and came?

A. Yes, sir.

Q. Well, then, did you go right across township 15-20?
A. Yes, sir.
Q. And how did you come back as you came back the same route?
A. No, sir.
Q. How did you come back?
A. I hardly ever come back the same route. I came out by the way of Summit Prairie, out by the way of Lookout Mountain down by the way of what is called Canyon Creek.
Q. Did you cruise 15-19 coming back?
A. No, I didn't coming back that way.
Q. You came to the shearing plant didn't you?
A. Yes, I came to the shearing plant and staid two nights.
Q. How did you get to the shearing plant coming back? Did you cross 15-19?
A. I staid there two nights as I told you, as I was on my way into that country at two different times.
Q. Oh, I see, and you came out both times another way?
A. Yes, sir.
Q. Didn't come across 15-19 at all?
A. No, sir.
Q. Now the next time you came back was in last fall, you say?
A. Yes, sir.
1129 Q. Where did you strike 15-19, then? At the shearing plant again?
A. And I have never came back that way I have told you before that I never came back that way.
Q. But in the fall, did you go out there at all last fall? I understood you were out there again?
A. Yes, sir.
Q. Were you on 15-19 that time?
A. Well, I could not get into that country without coming across 15-19 as I know of and take the same road that I had always used before.
Q. You went up the same road you had gone before?
A. Yes, sir.
Q. Went up to the shearing plant?
A. Yes, sir, went up by it.
Q. Went across township 20?
A. Yes, sir.
Q. On the same road?
A. Yes, sir.
Q. And you came back another way that time, did you?
A. Yes, sir.
Q. And that is the only time you had been on that township at all?
A. I have been across there three different times that I remember?
Q. Well, you have given three times?
A. Yes, sir.
Q. That is the only time that you were ever on the township at all, as far as you know?
A. That is all that I know.

Witness excused.

1130 And thereafter one, James Keenan, being called in rebuttal by the Government was saked among other things the following question: "What sort of a country is that for sheep pasture in 15-19?

To which the defendants objected as irrelevant, immaterial and not proper rebuttal, but the objection was overruled and the defendants excepted. Whereupon the witness answered, "Well, I believe it is about the best I ever saw anywhere."

Thereafter G. G. Brown was called as a witness in rebuttal, by the Government, and having identified a deed issued by the State Land Board to Mary A. Swearingen, of date 24th of June, 1902, to the land applied for by her as hereinbefore shown, offered said deed in evidence, which deed was as follows:

STATE OF OREGON:

In consideration of two hundred dollars paid to the State Land Board, the State of Oregon does hereby grant, bargain, sell and convey unto Mary A. Swearingen, the following described land, to-wit: Situated in Crook County, Oregon; the Northeast quarter of Section 16, Township 15 South, Range 19 East of the Willamette Meridian, containing 160 acres."

To have and to hold the same unto said Mary A. Swearingen her heirs and assigns forever.

Witness the seal of the State Land Board, affixed this 26th day of June, 1902.

(Signed) T. T. GEER, *Governor.*
I. F. DUNBAR, *Secretary.*
CHARLES S. MOORE,
Treasurer."

To which the defendants each separately objected as immaterial and irrelevant, and bringing in collateral matters in no way involved in the case, and as to which defendants each separately aver that it is not connected with him in any way. Whereupon the said offer was limited by the Court to the defendants Williamson & Gesner. And the said defendants, and each of them severally excepted to the ruling of the Court, and their exception was allowed, and said deed was read in evidence to the jury.

1131 Thereafter the application of Sarah M. Gerowe hereinbefore referred to, was identified by the witness and offered in evidence. To which the defendants and each of them object as immaterial, irrelevant in no way connected with each defendant respectively, but the objection was overruled, and the defendants each excepted and their exception was allowed.

And thereafter the Government offered in evidence a deed from the State Land Board of the State of Oregon to J. M. Williamson, E. N. Wakfield, and V. Gesner, of which the following is a copy:

STATE OF OREGON:

In consideration of four hundred and 00/100 Dollars paid to the State Land Board, the State of Oregon does hereby grant, bargain, sell and convey unto J. N. Williamson, E. N. Wakefield, and V.

Gesner, the following described lands, to-wit: Situated in Crook County, Oregon; the West half of section 16, Township 15 South, Range 19 East, of the Willamette Meridian, containing 320 acres.

To have and to hold the same unto the said J. N. Williamson, E. N. Wakefield, and V. Gesner, their heirs and assigns forever.

Witness the seal of the State Land Board, affixed this 12th day of August, 1902.

[L. S.]

T. T. GEER, *Governor.*
F. I. DUNBAR, *Secretary.*
CHARLES S. MOORE,
Treasurer.

To which the defendants each then and there excepted, as not proper rebuttal, immaterial, irrelevant and tending to prejudice the defendant by bringing in collateral matters; but the objection was overruled, and the defendants each excepted, and said exceptions were allowed.

The following is all of the testimony of the aforesaid witness G. G. Brown, introduced at the trial:

1132 SEPTEMBER 22, 1905.

G. G. BROWN, a witness called in rebuttal on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. HENEY:

—. Mr. Brown, what position do you occupy at present?

A. Clerk of the State Land Board.

Q. How long have you been clerk?

A. Since the 1st of April, 1903.

Q. Have you with you some of the records of the State Land Board and is the paper which you now hold in your hand, appearing to be an application to purchase by Mary A. Swearingen, of date, 24th of June, 1902, one of the records at your office?

A. Yes, sir; it is.

Q. Are you familiar with the signature of J. J. Smith, County Clerk of Crook County?

A. No, sir; I am not; I have seen it on a few letters, that is all. I would not consider that I am familiar enough with it to testify to it.

Q. Do you think, from looking at the signature upon that application and the signature upon that letter, that you could give an opinion as to whether that is his signature on the letter?

Mr. BENNETT: We object to that, your Honor, as being incompetent, no proper foundation laid, and because they have not shown that this witness knows anything about his signature.

Mr. HENEY: All right.

Q. Is that letter which is attached to that paper part of the files of your office?

A. It is.

Q. In that particular case?
A. Yes, sir.
Q. Now, I will ask you for your deed issued in that matter.
1133 Are the records of deeds here?
A. Yes, that is a part of the records of the State Land Office.
Q. That book is a part of the records of the State Land Office and in that book what is kept?
A. A copy of the State deeds.
Q. Now then, did a deed issue on that application of Mary A. Swearingen?
A. Yes, sir; on June 26th, 1902.

Mr. BENNETT: We object to this, may it please your Honor, as incompetent and immaterial, and no paper from which a witness has a right to refresh his memory; we object, because the deed itself or, if it is recorded, a certified copy of the record, is the best evidence.
Objection overruled.
Mr. HENEY: We offer the original record now; it is on page 363, is it, Mr. Clerk?

A. Yes, sir.

Mr. BENNETT: May it please your Honor, I don't understand that this is any record that is required to be kept by law; I wouldn't say that there is no law requiring such a record to be kept, but in this state, I think we have a statute which provides that any record which is required to be kept by law, may be proven by a certified copy, and this, as I understand it, would not be provable in this way in the State Court.
Objection overruled.
Defendants except.

Q. The book which you now have is book "Z" of Records of Deeds, State of Oregon, is it?
A. Yes, sir.

Mr. BENNETT: I suppose all of this may go in subject to our objection.
Mr. HENEY: Yes. We will offer page 363 in evidence.
Mr. BENNETT: Now, may it please your Honor, we object
1134 to the admission of the deed, as a matter of law and irrelevant, and we object on behalf of each of the defendants separately, to the admission of it as immaterial and irrelevant, and bringing in collateral matters in no way involved in this case, and as being incompetent and not sufficiently proven, and on behalf of each defendant, as to him, that it is not connected with him in any way.
Objection overruled.
COURT: The limitation in respect to the offer as against two of the defendants applies to this also?
Mr. HENEY: Applies to all of these.
COURT: It may be admitted against the two defendants only.
Defendants except.

Mr. Heney reads the entry as follows:

"STATE OF OREGON:

In consideration of $200 paid to the State Land Board, the State of Oregon does hereby grant, bargain, sell and convey unto Mary A. Swearingen the following described land, to-wit: Situate in Crook County, Oregon; the north-east quarter of section 16, township 15 south, range 19 east of the Willamette Meridian, containing 160 acres, to have and to hold the same unto said Mary A. Swearingen, her heirs and assigns forever.

Witness the seal of the State Land Board affixed this 26th day of June, 1902.

T. T. GEER, *Governor.*
F. I. DUNBAR, *Secretary.*
CHARLES S. MOORE, *Treasurer.*"

Q. I will ask if these records were in the office—the book containing that was in the office when you took the office?
A. Yes, sir.

Mr. BENNETT: Of course that all goes in subject to our objection, I suppose.

Q. Do you know the handwriting that is in that record?
A. That is the handwriting of one of the clerks who is now in the office.
1135 Q. Are you familiar with the signature of M. L. Chamberlain?
A. That is a fac simile of his signature; he used a fac simile stamp to sign these papers, to file.
Q. That is upon the application of Mary A. Swearingen which is in evidence?
A. Yes.

Mr. HENEY: Now, we will offer the application of E. W. Barnes for the southwest quarter of the same section, solely for the purpose of showing, as a circumstance in corroboration of the testimony of the last witness as to why the daughter did not take the quarter also. That is, this quarter was taken prior to that time—the 14th of April, 1902.

Mr. BENNETT: We object to this.

Mr. HENEY: I am going to ask him some questions before I offer it.

Q. Have you here the records of your office in relation to the southeast quarter of section 16, township 15 south of range 19 east?
A. Yes, sir.
Q. I will ask you if this paper which is now handed you—I will call your attention to the signature of M. L. Chamberlain, and ask you whether that is his signature or not.
A. That is the same as the other; a fac simile stamp used.
Q. Is this a part of the records of your office relating to that land I have just described?

A. The southeast quarter of section 16, 15 south range 19 east?
Q. Yes.
A. It is.

Mr. HENEY: We will offer this paper for the sole purpose stated.
COURT: It may be admitted for that sole purpose.
Mr. BENNETT: We object to it as being immaterial, irrelevant and not in any way connected with any of the defendants, or binding upon any of the defendants, and as not being proper rebuttal.
1136 Objection overruled.
Defendants except.

Q. Have you the records of the State Land Office with you, relating to the west half of section 16 in township 15, south, range 19 east?
A. Yes, sir.
Q. The first paper I hand you is marked "Certificate of Sale, No. 12766." I will ask you as to the signature of M. L. Chamberlain on that paper.
A. I beg your pardon, Mr Heney; that is the application to purchase; the certificate is here.
Q. The application to purchase is what I mean to say. No. 12766.
A. That is a fac simile stamp used, the same as the others.
Q. Have you a letter there that is part of the files of this office in relation to that claim, or that particular piece of land?
A. Yes, sir.

Mr. HENEY: Will you admit the handwriting?
Mr. BENNETT: What is this notation at the side?
Mr. HENEY: We don't care anything about that.
Mr. BENNETT: You don't offer that notation in evidence?
Mr. HENEY: No.
Mr. BENNETT: We make no question about the handwriting.
Mr. HENEY: Then, it being admitted that it is the handwriting of Dr. Gesner, we will offer this letter in evidence.
Mr. BENNETT: We object to it on behalf of each of the defendants separately, as being immaterial and irrelevant and not proper rebuttal; as tending to bring collateral matters in no way connected with this case, and upon the part of the defendant Biggs and the defendant Williamson, we object to it upon the further ground that it is in no way connected with them, whatever.
Mr. HENEY: This evidence is all offered as against Williamson and Gesner only.
1137 COURT: It may be admitted.
Mr. BENNETT: We object separately, then on behalf of the defendant Williamson, to the offer as against him upon the ground indicated and we object also on behalf of the defendant Biggs; this is in addition to our general objection, on the ground that he is in no way connected, and we take an exception upon the parts of each of the defendants, to the ruling of the Court. Mr. Heney reads the letter as follows:

"PRINEVILLE, ORE., *June* 23, 1902.

M. L. Chamberlain, Salem, Oregon.

MY DEAR SIR: Enclosed find check for $80 for payment on the west half of section 16 T. 15 S. R. 19 E., containing 320 acres. My sister, Mrs. S. M. Gerowe, will forward the application as soon as she can sign it. Who has the southeast quarter of the section? Is it paid up on, or is it subject to a new filing? Please let me know at your earliest convenience. I am

Yours respectfully, VAN GESNER."

Q. How are the records of that office kept with reference to answers to letters?

A. Carbon copies are kept of the answers.

Q. And have you among the files of that particular—at least what purports to be an answer to that?

A. Yes, sir.

Q. And whose signature does it bear?

A. M. L. Chamberlain, the clerk of the Board.

Mr. HENEY: We will offer the reply.

Mr. BENNETT: We object to this letter, may it please your Honor, upon behalf of each of the defendants, as immaterial, irrelevant, as bringing in col-ateral matters, *as immaterial, irrelevant, as bringing in collateral matters,* in no way connected with the case, and as not being proper rebuttal.

Mr. HENEY: We will withdraw the offer, as we cannot prove it was mailed, I guess.

Q. Have you in your possession an application for that particular piece of land, as a part of the files?

1138 A. This is the application of Sarah M. Gerowe for the west half of section 16, township 15 south, range 19 east.

Q. Whose signature is on the back of that application?

A. That is a fac simile stamp of Mr. Chamberlain's; M. L. Chamberlain, Clerk of the Board.

Mr. HENEY: We will offer that application in evidence.

Mr. BENNETT: We object to it, may it please your Honor.

Mr. HENEY: I thought those objections were considered to go to all of those papers.

Mr. BENNETT: Some of these are different, your honor. This one, the affidavit is made in Spokane, Washington, before Stanley Hallett, Notary Public for the State of Washington. We object to it, your Honor, upon the ground that it is immaterial and irrelevant and tends to bring in collateral matters; we object to it on behalf of each of the defendants, that it is in no way connected with them, and as not proper rebuttal testimony, and we object to the affidavit upon the ground that it purports to have been taken several hundred miles away from the scene of the alleged subornation of perjury in this case, and before an entirely different officer, and in an entirely different state, and in an entirely different matter.

COURT: What land is this?

Mr. HENEY: This is the west half of section 16, and this is the land referred to by Dr. Gesner in regard to his sister.

MR. BENNETT: We object to it upon the further ground that there is no evidence that the officer who is claimed to have administered the oath was authorized to administer the oath, and we take an exception as to each of the defendants.

Mr. HENEY (Reading—)

Application to Purchase.

To the State Land Board:

I hereby apply to purchase the following described school lands situated in Crook County, Oregon, to wit: the west half of section sixteen (16), all in township 15 S, Range 19 E., containing 320 acres, and I agree to pay for the same according to law.

SARAH M. GEROWE.
(Signature of applicant.)

1139 This 26th day of June, A. D. 1902.

STATE OF WASH., *County of Spokane, ss:*

I, Sarah M. Gerowe, being first duly sworn, say that I am over eighteen years of age; that I am a citizen of the United States; that the proposed purchase is for my own benefit, and not for the purpose of speculation; that I have made no contract or agreement expressed or implied, for the sale or disposition of the land applied for in case I am permitted to purchase the same, and that there is no valid adverse claim thereto.

SARAH M. GEROWE.
(Signature of applicant.)

Subscribed and sworn to before me this 26th day of June, 1902.
STANLEY HALLETT,
Notary Public in and for the State of Washington, Residing at Medical Lake.

Then there is a seal of a Notary upon the paper, which bears the imprint "State of Washington, Stanley Hallett," and then in the center, "Notary Public" and surrounding that, "Expiration of Commission March 5, 190-" Can you make it out?

A. It looks like 1906 to me; I won't say that it is but it looks like a six.

Mr. HENEY: Yes, it shows on the back very plainly. Then there is a file mark, "Sarah M. Gerowe, Application to purchase School Lands, T. 15, S. R. 19 E. Certificate of Sale, No. 12766; issued June 28th, 1902; deed executed August 12, 1902. State Record of Deeds, Vol. "Z," D-428. Filed June 28, 1902. M. L. Chamberlain, Clerk of Board."

Q. I will ask you if you have with you the records of deeds for the State of Oregon, described in this application?

A. Yes, sir.

Q. Have you the records with you?

A. This is State Record of Deeds, Book Z, page 428; deed was issued August 12, 1902 to J. N. Williamson, E. N. Wakefield, and——

Mr. BENNETT: We want to object to this.

Q. This is the record is it?

A. Record of the Land Office, yes.

Q. Kept by whom?

A. Kept by the Clerk of the State Land Board.

1140 Mr. HENEY: We will offer the record as it appears, page 428 of book "Z," Record of Deeds, State of Oregon.

Mr. BENNETT: Now, we make the same objection to this as to the matter of the other deeds and the same book, and take an exception as to each of the defendants.

Mr. HENEY:

"STATE OF OREGON:

In consideration of four hundred 00/100 dollars paid to the State Land Board, the State of Oregon does hereby grant, bargain, sell and convey unto J. N. Williamson, E. N. Wakefield and V. Gesner, the following described lands, to-wit, situate in Crook County, Oregon; the west half of section 16, township 15 south, range 19 east of Willamette Meridian, containing 320 acres, to have and to hold the same unto the said J. N. Williamson, E. N. Wakefield and V. Gesner, their heirs and assigns forever.

Witness the seal of the State Land Board affixed this 12th day of August, 1902.

[L. S.]

T. T. GEER, *Governor.*
F. I. DUNBAR, *Secretary.*
CHAS. F. MOORE, *Treasurer.*

Cross-examination.

Questions by Mr. BENNETT:

Q. Mr. Brown, who keeps this record of deeds that has been offered in evidence?

A. The Clerk of the State Land Board.

Q. You say you are Clerk of the State Land Board?

A. I am now, yes.

Q. And have been how long?

A. Since the first of April, 1903.

Q. You know nothing about the keeping of this prior to that time?

A. I was a Clerk in the office before I was appointed Clerk of the Board.

Q. How long had you been a clerk in the office.

A. Since the 1st of August 1895.

Q. What particular department in the office did you have charge of?

A. I was Chief Deputy in the office.

Q. Who keeps this record? Who makes this record and keeps it. What one of the clerks?

1141 A. Well, it was under my supervision that those records were made.

Q. You don't make it yourself?

A. I didn't write that; I didn't copy that deed, no.

Q. Now this is a record that is kept as I understand it, for your own convenience there; for the convenience of the office?

A. I think the law provides that we keep that record.

Q. That you should keep a record of deeds?

A. Yes, sir.

Q. Do you know what provision of law it is? Do you know what section of the law it is that you claim provides for that?

A. Will you give me a Bellinger and Cotton's Code, second volume. I am not certain; I may be mistaken; but I think the law provides for it.

Witness reads from code, section 3305 of Bellinger & Cotton's Code; reads the form of deed to be used by the Board and follows with these words:

"Which deed without acknowledgment shall be admitted to record and shall be conveyed to the grantee all the estate which state has in the lands at date thereof, and the Board shall preserve in a bound volume a true copy of all such deeds with an alphabetical index of the names of the grantees, and such copies shall be primary evidence of such conveyance."

Q. Now, the signature of Mr. Chamberlain in this application—Mr. Chamberlain is clerk of the Board, is he?

A. He was Clerk of the Board at the time those certificates on these applications were filed.

Q. That is not his own signature as I understand it.

A. No, sir, it is not. It is a stamp used; was a stamp used by him.

Q. That is just simply a rubber stamp.

1142 A. Rubber facsimile stamp, yes, sir. It is a facsimile of his signature.

Mr. BENNETT: Now, your Honor, we renew our motion to strike out each and every one of these papers, separately on behalf of each of the defendants separately and the testimony of the witness upon the same ground stated respect*fully*, in the objection to it.

Motion is denied.

Defendants except.

Witness excused.

1143 At the close of the argument of the respective counsel the Court charged the jury as follows, and the following are all of the instructions given by the Court to the Jury:

1144 GENTLEMEN OF THE JURY:

Under the laws of criminal procedure, of the United States, persons charged with crime are generally put upon their trials through

indictments duly found and presented by a grand jury. An indictment is a formal accusation made by the grand jury charging a person with the commission of a public offense. But you are all of you doubtless wholly familiar with the rule of law that a defendant is not to be prejudiced by the mere fact that an indictment has been found against him and that when the question of his guilt or innocence is tried, a trial jury must not be influenced by the fact that he has been indicted. So too, here, as in all criminal trials, the law is that a defendant is presumed to be innocent of the crime charged until his guilt is proved by competent evidence beyond a reasonable doubt. As a corollary of this fundamental principle, when the acts and conduct of a man are such that they may equally well be attributed to an honest and lawful purpose on his part, or to a criminal intent, they should be assumed to be prompted by the lawful rather than the unlawful purpose.

Conforming to the requirement that to justify conviction, a jury must be satisfied of guilt beyond a reasonable doubt, courts have tried to aid juries by explaining to them what is a reasonable doubt, and I know of no definition which makes it clearer than this: A reasonable doubt is not such a doubt as any man may start by questioning for the sake of a doubt, nor a doubt suggested or surmised without foundation in the facts or testimony. It is such a doubt only as in a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other
1145 matters of the highest importance, prevents the jury from coming to a conclusion in which their minds rest satisfied. If so using the mind and considering all the evidence produced, it leads to a conclusion which satisfies the judgment and leaves upon the mind a settled conviction of the truth of the fact, it is the duty of the jury so to declare the fact by their verdict. It is possible always to question any conclusion derived from testimony, but such questioning is not what is a reasonable doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge.

Turning from these general matters which are always applicable, let us look into the charge against these defendants.

The indictment accuses them of conspiracy to suborn perjury: The Statute of the United States upon conspiracy reads as follows:

"If two or more persons conspire, either to commit any offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

It is substantially charged that Williamson, Gesner and Biggs, on or about June 30, 1902, unlawfully conspired, combined, confederated and agreed together and with divers other persons to commit an offense, that is unlawfully, wilfully and corruptly to suborn, instigate and procure a large number of persons to commit the crime

of perjury by taking their oaths before a competent officer
1146 and person, in cases in which the laws of the United Statees authorized an oath to be administered, that they would declare and depose truly that certain declarations and depositions by them to be subscribed were true and by thereupon, contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be true; that is to say to suborn instigate and procure the said persons respectively, to come in person before Marion R. Biggs, who was then a United States Commissioner, for the District of Oregon, and after being duly sworn by the said Biggs as United States Commissioner, to state and subscribe under their oaths, that certain public lands of the United States, lying in Crook County, Oregon, open to entry and purchase under the Acts of Congress, known as Timber and Stone Lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the exclusive use and benefit of those persons respectively, and that they had not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever by which the title, which they might acquire from the United States in and to such lands, should inure, in whole or in part, to the benefit of any person except themselves, when in truth and in fact, as each of the said persons would then well know, and as they the said defendants, would then well know, such persons would be applying to purchase such lands, on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit, and would have made agreements and contracts with them, the defendants, by which the titles which they might acquire from the United States, in such lands, would inure to the benefit of the defendants Williamson and Van Gesner, as copartners in the firm of Williamson and Gesner, sheep raisers in Crook County; the matters so to be stated subscribed and sworn by the said per-
1147 sons being material matters, and matters which the said persons to be suborned instigated and procured, and the said defendants Williamson, Van Gesner and Biggs, would not believe to be true; and the said Biggs, United States Commissioner, when administering such oaths to those persons, being an officer authorized by law to administer the same oaths, and the same oaths being oaths administered in cases where a law of the United States would then authorize an oath to be administered.

It is further charged that, in pursuance of the said unlawful conspiracy, combination and agreement, and to effect the object of the same, the defendant Biggs, afterwards did an overt act, that is that he prepared a paper called a sworn statement for the signature of one Campbell A. Duncan, who was one of the persons who was to be suborned, instigated and procured as charged.

I will read you a copy of the paper or sworn statement:

"Timber and Stone Lands—Sworn Statement.

LAND OFFICE AT THE DALLES,
OREGON, *June 30th*, 1902.

"I, Campbell A. Duncan of Prineville, County of Crook, State of Oregon, desiring to avail myself of the provisions of the Act of Congress of June 3rd, 1878, entitled an Act for the sale of timber in the States of California, Oregon, Nevada and Washington Territory, as extended to all the public land States by act of August 4th, 1892, for the purchase of the S. 2 of N.E. 4 and S. 2 of N.W. 4 of Section 14, Township 15, S. of Range 18 E. W. M. in the district of lands subject at The Dalles, Oregon, do solemnly swear that I am a native citizen of the United States of the age of 34 and by occupation farmer; that I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, nor as I verily believe, any
1148 valuable deposits of gold, silver, cinnabar, copper or coal; that the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that I have made no other application under said Act; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit; and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure, in whole or in part to the benefit of any person except myself, and that my postoffice address is Prineville, Oregon.

——— ———, *Applicant.*

STATE OF OREGON, *County of Crook, ss:*

— ——— ——— do hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by ——— ———) and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this — day of ———, 1902."

The indictment then proceeds to charge other overt acts of a similar nature, and alleges that in pursuance of the alleged unlawful conspiracy and to effect the object of the same, the defendant Biggs unlawfully prepared certain other sworn statements for the signatures of other persons, who were to be suborned, instigated and procured as alleged, that is, the sworn statements required of persons as applicants to purchase public lands under the provisions of the said timber and stone act of Congress, similar to the sworn statement that I have read to you, and referring to certain other
1149 public lands, which are specifically described in the sworn statements set forth in the indictment.

The names of such other persons who are charged to have made

such sworn statements as set forth, are Susie M. Duncan, Frank Ray, Ethie M. Ray, Ben F. Jones, Nancy D. Jones, Green Beard, Mary J. Beard, Emmett B. Holman, Henry Hudson, Christian Feuerhelm, Wilfred J. Crain, Jennie Crain, Henry E. Beard, Jefferson D. Evans, Mahala J. Evans, Ernest D. Starr, John S. Watkinds, and Lettie Watkinds.

To conspire is to enter into a conspiracy, and a conspiracy may be described as an unlawful confederacy or combination formed by two or more persons to effect an unlawful purpose; said persons acting under a common purpose to accomplish the unlawful end desired.

The Statute of the United States read to you requires not only that it shall be proved beyond a reasonable doubt that such an unlawful combination has been entered into, and that it was to commit an offense as charged, but that one or more of the parties to the conspiracy has done an overt act to effect the object of the conspiracy. There is therefore something more required than a mental purpose to authorize a conviction in a case of this kind.

A common design is the essence of the crime of conspiracy, and this may be made to appear when the parties steadily pursue the same object when acting separately or together, by common or different means, all leading to the same unlawful result. When it is proven that they do so act with a common unlawful design, the principle upon which the acts and declarations of one of the conspirators in the prosecution of the enterprise are admitted in evidence against all the persons prosecuted is that, by the act of conspiring together, the conspirators have jointly assumed as a body the attribute of individuality so far as regards the prosecution of the common design, thus rendering the acts and declarations of one done in furtherance of that design, a part of the *res gestæ* and therefore the acts of all. Men are presumed to intend the natural, usual and probable consequences of their acts, voluntarily done.

Positive evidence entirely in proof of a conspiracy is not necessary to be had. From the nature of the case, the evidence frequently is in part circumstantial. So, though the common design is the essence of the charge, it is not necessary to prove that all of the parties charged met together and came to an explicit and formal agreement for an unlawful scheme, or that they did directly by words or in writing state to each other what the unlawful scheme was to be and state to each other the details of the plan or means by which the unlawful combination was to be made effective; that is, it is not necessary that that should be shown by direct evidence; the offense is sufficiently proved if the jury is satisfied from the evidence, beyond a reasonable doubt, that two or more of the parties charged, in any manner or through any contrivance positively or tacitly came to a mutual understanding to accomplish a common and unlawful design, followed by some act done by any one of the parties for the purpose of carrying it into execution; in other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work

together in any way in furtherance of the unlawful scheme, every one of said persons becomes a part of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. It is not necessary that each of the parties should, in person, commit the unlawful act, if such act is a part of the plan for which the combination is formed; for if the unlawful agreement had been proven to your satisfaction and beyond a reasonable doubt, the act of one in furtherance of the conspiracy becomes the act of all.

1151 The Government is not required to furnish direct evidence of a conspiracy or of the knowledge or intent of the defendants or either of them, but the conspiracy, knowledge or intent of the defendants may be established by circumstantial evidence, if sufficient for that purpose. The rule in relation to circumstantial evidence as applied in the trial of a defendant charged with crime is this: In order to justify a jury in finding a verdict of guilty based entirely on circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence, or, stated in another form, it is not sufficient that the circumstances proven coincide with, and therefore render probable the hypothesis of guilt as asserted by the prosecution but they must exclude to a moral certainty and beyond a reasonable doubt every other hypothesis but the single one of guilt or the jury must find the defendant not guilty.

Now, as said, the conspiracy here charged being to suborn persons to commit perjury in applying for and entering lands, it is proper to tell you how "perjury" and "subornation of perjury" are defined.

Perjury is defined this way: Every person, who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare and depose or certify truly, or that any written testimony, declaration or deposition or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and is punishable by fine or imprisonment.

1152 It follows that if a false statement is made by a person under oath by mistake or carelessness without his knowing or intending it to be false, there is no perjury.

Every person who procures another to commit any perjury is guilty of subornation of perjury, and is punishable by fine or imprisonment.

A conspiracy to suborn perjury includes every element of subornation of perjury except the actual commission of the crime of perjury. Whether the conspiracy was successful or not is immaterial. But there must be the same intention to procure the persons to be suborned wilfully and corruptly to swear to something which the party taking the oath does not believe to be true, and it must be intended by the person who procures the taking of such oath that the false statement therein shall be willfully and corruptly made.

Let us advance now, to the matter concerning which the suborna-

tion of perjury charged is directly related—the application to purchase lands under the timber and stone acts.

Under the Act of Congress for the sale of timber lands, it is generally provided that the surveyed public lands of the United States, not included within military, Indian or other reservations of the United States, chiefly valuable for timber, but unfit for cultivation, and which have not been offered at public sale, according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding 160 acres to any one person, or association of persons at the minimum price of $2.50 per acre.

Section 2 of the act reads as follows:

"That any person desiring to avail himself of the provisions of this act shall file with the Register of the proper district a written statement in duplicate, one of which is to be transmitted to
1153 the general land office, designating by legal sub-divisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements; except for ditch or canal purposes, where any such do exist, except such as were made by or belong to the applicant, nor as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper or coal; that deponent has made no other application under this Act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the Land Office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers shall be null and void."

So much of Section 3 as is material reads as follows:

"That upon the filing of said statement, as provided in the second section of this act, the register of the Land Office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication at the expense of such applicant, in a newspaper published nearest the loca-
1154 tion of the premises, for a like period of time, and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act; unoccupied and without improvements other than those excepted, either mining or agricul-

tural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal; that upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in the case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon."

Effect is to be given to the provisions of the law by regulations to be prescribed by the Commissioner of the General Land Office at Washington.

The first step, therefore, on the part of any person desiring to avail himself of the benefits of the law is the filing of a written statement which must be sworn to before the register or receiver, or which may be sworn to before a United States Commissioner, designating the particular tract which the applicant *desires to purchase* setting forth that the land is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements except for ditch purposes, nor, as deponent verily believes, any valuable deposits of gold, silver, cinnabar, copper or coal; that deponent has made no other *application* under this act; that he does not *apply to purchase* the same on speculation
1155 but in good faith to appropriate the land, to his own exclusive use and benefit, and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself. If a person taking the oath to such statement swears falsely in the premises the law subjects him to all the pains and penalties of perjury.

Now, when the sworn statement is filed, the register posts a notice of the application embracing a description of the land, in his office for a period of sixty days and furnishes the applicant a copy of the same for publication in the newspaper published nearest the location of the premises for a like period of time. And it is provided by law and by regulation duly made by proper authority and having the force and effect of law, that, after the expiration of said sixty days, the person or claimant desiring to purchase shall furnish to the register of the Land Office satisfactory evidence, among other things that notice of the application prepared by the register was duly published in a newspaper as required by the law; that the land is of the character contemplated in the Act that the applicant has not sold or transferred his claim to the land since making his sworn statement and has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whomsoever, by which the title he may acquire from the Government may inure, in whole or in part, to the benefit of any person except himself; and that he makes his entry in good faith for the appropriation of the land exclusively for his own use and not for the use and benefit of any other person.

I may here incidentally tell you that Congress has provided that

"all proofs, affidavits and oaths of any kind whatsoever required to be made by applicants and entrymen under the timber and
1156 stone Act may be made before a United States Commissioner and that when so made and duly subscribed shall have the same force and effect as if made before the Register and Receiver; and in this case defendant Biggs as United States Commissioner was authorized to take affidavits, depositions and proofs in matters under the timber and stone Act.

The Statute in forbidding the applicant to make, directly or indirectly, any agreement or contract in any way or manner with any person by which the title he may acquire from the Government shall inure in whole or in part to the benefit of any person except himself means by the word "agreement" that there must be a meeting of minds expressed in some tangible way, and must be intended in some way to be binding upon the parties. One party may have intended to sell; the other party may have intended to buy; yet this would not be enough unless the intention of each was in some way communicated from the one to the other and was understood and agreed to by both. An agreement, as the word "Agreement" is used need not be in writing it need not be of sufficient formality or of a nature to be enforced in a Court. It is enough if it is proved beyond a reasonable doubt that in some way the minds of the applicant, and some other person have met definitely, understandingly, that there is a mutual consent upon the point that when the applicant may acquire title to the land from the United States it shall inure to the benefit of such other person for a consideration; that is, that in truth and in fact the applicant is really to acquire the land for the use and benefit of another. And any words or any acts and words manifesting this mutual consent of the minds of the parties are sufficient to constitute a contract or agreement.

1157 You will readily appreciate the policy which pervades the timber and stone Act. It is meant to enable such persons as may be qualified to acquire by purchase certain classes of public lands unfit for cultivation, subject to entry under its provisions which have been read to you but an entryman must apply for and enter the lands in good faith for his own exclusive use and benefit. He cannot lend himself to others and become merely an instrument for the acquisition of lands under an agreement that others shall pay all the expenses of his entry and give him a sum of money, for exercising his right and that when he may acquire title to the land, he shall convey it to them or to someone for them.

The entry man must always deal in good faith with the Government, from the initiation of his claim that is by an application to purchase which continues from the time that he may make his sworn statement up to and including his deposition or sworn statement at final proof. Then when he has made payment into the land office of the purchase money for his tract he is permitted to enter it and thereafter to receive patent therefor.

A person qualified under the law has a right to enter lands under the provisions of the timber and stone act, even though he considers, prior to the time of making his sworn statement and his final

proof a sale of it as soon as he can after he makes his final proof and obtains the usual receiver's receipt.

That is to say, Gentlemen, you will understand that the law does not make it obligatory that an entryman who acquires title under the timber and stone act shall keep the land, nor does it control his use or right to dispose of it for any period of time after he shall have complied with the provisions of the law in perfecting the right to the claim. But the statute does announce a prior agreement, the acting for another in the purchase from the Government of
1158 the United States. However, if when the title passes from the Government to the entry-man, by receiver's receipt after final proof no one save the purchaser has any claim upon it or any contract or agreement for it, the law is satisfied.

The act does not in any respect, limit the dominion which the purchaser has over the land after he acquires his final receipt from the Government of the United States, or restrict in the slightest his power of alienation.

There is some testimony offered by the defendants tending to show that Dr. Gesner was in the market for the purchase of land entered under the timber and stone act. By itself, this would be legitimate and neither implies nor suggests wrong. A man may legitimately go or send into a vicinity and make known generally or to individuals a willingness to buy timber land at a price in excess of that which it would cost, to obtain it from the government and any person knowing of that offer may rightfully go to the land office and make application and purchase a timber tract from the Government. Nor do I think that the more indefinite expectation on the part of a claimant or applicant to give someone a preference in buying the land if he would give as much as anyone, would be in conflict with the oath required by the applicant. So a man may legitimately undertake, either gratuitously or for hire to locate persons upon stone and timber claims; that is, he may search out a claim; take upon it a would be locator; point out to him the lines of the claim; tell him of the character of the ground, and assist him in estimating the amount of timber on the claim, and do any and all similar acts to aid and assist him in acquiring a title to the land. So it is entirely legitimate for a person to loan money to persons desiring to enter lands under the timber and stone act for the purpose of defraying the expenses incident to the entry, and to
1159 pay for the land, and to agree with the would be entryman that the loan so made would be secured by a mortgage on the land. But a loan and mortgage, if made, must be made in good faith, and not under any prior contract or agreement, direct or indirect, that when the title to the land is secured, the loan and mortgage shall be satisfied by transfer of title to the land.

The defendants have offered testimony tending to show an agreement between Gesner and some or all of the applicants that Gesner, or Gesner and Williamson, might have the use of the grazing privilege on the lands, in place of interest on possible loans. An applicant under the timber and stone act would have a right to make

any arrangement he sees fit for the temporary disposal of the grazing privilege, and in so doing would not violate the law.

But, as heretofore said, if he is not in good faith and has directly or indirectly made any agreement or contract in any way or manner with any person by which the title he may acquire from the United States shall inure in whole or in part to the benefit of any persons except himself, then he commits perjury in making his sworn statement, and in making a deposition that he has not done those things; and any person who knowingly and wilfully procures and instigates the person to make such sworn statement or deposition is guilty of subornation of perjury.

Having now placed before you the timber and stone law and what it denounces, and what it permits, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of loaning money to applicants under it, and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he
1160 could not be convicted of crime which involves wilful and unlawful intent; even if such advice were an inaccurate construction of the law. But, on the other hand, no man can wilfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.

The essential questions then for your determination are, does the evidence show, beyond a reasonable doubt, that Williamson Gesner and Biggs, or two of them, knowingly and intentionally, entered into an agreement or combination to induce or procure persons to apply to purchase and enter the lands as alleged, or some part of the lands charged in the indictment as lands subject to entry under the timber and stone act, after having first come to an agreement or understanding with such persons that they would convey the title which they might acquire to Williamson and Gesner or either of them: And next, does the evidence satisfy you, beyond a reasonable doubt, that these defendants, so combining and agreeing, intended that the persons, or some of the persons, whom they might procure or induce to make such entries should wilfully and deliberately, in making their sworn statements or applications, to purchase such lands at the time of making the first paper, called a sworn statement, or at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner, applying to purchase such lands, commit perjury by swearing falsely that their applications were not made on speculation, but in good faith to appropriate the lands to the exclusive use and benefit of the applicant or applicants and that the applicant or applicants had not, directly or indirectly, made any agreement or contract in any way or manner, by which the title to be acquired from the United States should inure in whole or in part to the benefit
1161 of any persons other than himself or herself.

If, after weighing the entire evidence, you are satisfied beyond a reasonable doubt that affirmative answers to these several

questions should be had, and you further find, beyond a reasonable doubt, that some one of the overt acts charged in the indictment was done by any one or more of the defendants for the purpose of effecting the object of the conspiracy charged, then you should convict such of the defendants as you may find entered into and formed such conspiracy.

If you have a reasonable doubt of the truth of them or either of them, you should acquit.

Counsel for defendants have requested a charge upon weight to be given to the testimony of accomplices, meaning I take it, the testimony of those persons who were called by the Government as witnesses, and who made their sworn applications to purchase and enter lands referred to in the indictment, the defendants evidently contending that if any crime was committed at all, such persons were accomplices. An accomplice is one who is associated with others in the commission of a crime with a common intent, and if you are satisfied that the conspiracy existed as charged, and that the applicants for lands who have testified in this trial, wilfully and corruptly swore falsely when they swore in their applications to purchase that they had not entered into any contract or agreement directly or indirectly, with any person by which the titles they might acquire from the Government of the United States should inure to the benefit of anyone except themselves, then, while such persons are not accomplices in the conspiracy or crime for which these defendants are being tried, yet they are implicated in perjury, to commit
1162 which perjury it is alleged the applicants were instigated and procured by these defendants.

The general rule of law is that the testimony of an accomplice should be received with great caution and closely scrutinized. This rule is founded upon experience based upon the fact that an accomplice admits participation in a crime which his testimony would put upon another. But accomplices are competent witnesses and a jury should consider their evidence and weigh it by inquiring into the probable motive which prompted it and whether it be true or false and what credit ought to be given it are questions for the sole determination of the jury. The Government has a right to use an accomplice as a witness, and some times in fully developing the designs of men and bringing their purposes to light, the only testimony available may be that of tainted witnesses; yet, if a jury is convinced of the truth of what accomplices testify to they should give it the same effect as would be allowed to any witness who is in no respect connected with the offense charged.

The defendants have all taken the witness stand in their own interests. This was their right and their credibility is to be tested by and subjected to the same tests and only the same tests as are legally applied to any other witnesses. You should remember, however, in judging of their credibility that they are the defendants and the nature and enormity of the crime with which they are charged. You have a right too, to consider their interests in the results of the prosecution. Did they originate a false theory of defense? Is it a fact that they have been contradicted or corroborated by other credible evidence on matters material to the case?

1163 A witness is presumed to speak the truth, but this presumption may be overcome by evidence which contradicts him or which affects his reputation for truth, honesty and integrity, or by his manner upon the witness stand, or by evidence which shows that he has made statements at other times, or given testimony inconsistent with his present testimony. And if you believe that any witness has wilfully sworn falsely to any material matter upon the trial, you are at liberty to reject the entire testimony of such witness except insofar as it may be corroborated by other credible evidence.

It is an established fact in the case that each of the three defendants bore a good character prior to the finding of this indictment, and it is your duty to consider this fact together with all the other evidence in the case in determining their guilt or innocence. You must consider whether the evidence of such good character, when weighed and considered with all the other evidence raises a reasonable doubt as to the guilt of the accused: if it does, they should be acquitted. But if from the evidence you believe the defendants are guilty, then their previous good character neither excuses nor justifies the offense, and if after full consideration of all the evidence adduced (including evidence of good character) you believe the defendants to be guilty of the offense charged beyond a reasonable doubt, you should so find notwithstanding the proof of good character.

As I have occasion to admonish you during the course of the trial, however culpable you may believe the defendants or any of them may have been with reference to any offense testified to but not included in this indictment, or however well established you may deem the criminality of any of them in connection with any offense other than the one charged, you cannot find the defendants or any of them guilty unless you find, beyond a reasonable doubt, that they
1164 have committed the crime of conspiracy to suborn perjury as defined in these instructions, and as charged in the indictment. The examination into such collateral facts was allowed as tending to establish guilty intent, purpose, design or knowledge and should be so considered in such relation to the charge under which they are tried.

You will recollect there was certain testimony offered at different times by the prosecution with the express limitation that it applied only to certain of the defendants. This testimony was limited because, if a conspiracy had been established when it was ended the acts of each of the conspirators were no longer the acts of all but were solely his own, and are only admissible against the particular defendant who did such acts. Certain letters for instance, which were written by defendant Van Gesner, to applicants to relinquish their claims are not evidence against defendants Williamson and Biggs, for if there was the conspiracy charged, its purpose was ended before the letters were written. Such letters, however, are competent as against the defendant Gesner, and should be considered in deliberating upon his guilt or innocence. There was some evidence offered too as against particular ones only of the defendants, which

was also limited by the rule stated, and you should consider it accordingly.

There has also been some evidence introduced before you tending to show the acquisition of certain lands in an unlawful manner by defendant Van Gesner, which lands belonged to the State of Oregon, situate near to the public lands described in the indictment in this case. This evidence is admitted as tending to show a pre-existing design, plan or scheme on the part of the defendants Van Gesner and Williamson, as bearing upon the question of motive in the doing of the particular acts charged in the indictment; and it is
1165 limited in its relevancy to the charges against Williamson and Gesner. It has no relation to the defendant Biggs, and you cannot consider it as bearing upon the question of Biggs' guilt or innocence.

There is too, some evidence before you in relation to the character of the land applied for by some of the applicants, that is whether it was heavily timbered, or stony, or the like. The question of whether or not the lands applied for by the several entry men and entry women were lawfully of a character subject to entry under the timber and stone law, is not directly involved in this charge of a conspiracy to suborn. The relevancy of such evidence is the relationship it may have to the motive or intent or design of the defendants in the doing of the act charged against them in the indictment under which they are tried.

Under the indictment you may, as you find the evidence warrants, find all three of the defendants guilty or not guilty, or that two of the defendants are guilty and some one of the defendants is not guilty. The indictment being for conspiracy to suborn perjury it must be proved that at least two of the three defendants are guilty of the crime charged, and as explained to you in these instructions.

I now submit the case to you, Gentlemen, believing that I have sufficiently charged you upon those questions of law which are pertinent to the issues. You must be sensible of the importance of your responsibility. You, and you alone, are to weigh the evidence, applying the law as I have given it to you, and you alone are the judge of the credibility of the witnesses who have testified.

Counsel have argued the case to you and presented their respective views; the final ascertainment of the truth is your province, subject to the rules of law, and when it is so ascertained, your duty
1166 is to declare the truth by unanimous verdict and so, do your duty between the Government of the United States and these defendants."

1167 The defendants each duly excepted to that part of the instruction hereinbefore set forth, which reads as follows: "The offense is sufficiently proved if the jury is satisfied from the evidence, beyond a reasonable doubt that two or more of the parties charged, in any manner or through any contrivance positively or tacitly came to a mutual understanding to accomplish an unlawful design followed by some act done by anyone of the parties for the purpose of carrying it into execution;" as not the law and misleading.

The defendants each of them also excepted to the whole of the instruction hereinbefore set forth, reading as follows: "Every person who procures another to commit any perjury is guilty of subornation of perjury, and is punishable by fine or imprisonment:" as not the law and not the law of the case, and tending to lead the jury to believe that although the parties charged may have been innocent in their act, yet nevertheless they might have been guilty.

Defendants also excepted to the giving of said instruction hereinbefore set forth, reading as follows: "So much of Section 3 as is material reads as follows: "that upon the filing of said statement as provided in the second section of this act the register of the land office shall post a notice of such application embracing a description of the land by legal subdivisions, in his office for a period of sixty days, and shall furnish the applicant a copy of the same for publication at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that
1168 the land is of the character contemplated in this act; unoccupied and without improvements other than those excepted, either mining or agricultural and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal; that upon payment to the proper officer of the purchase money of said land together with the fees of the register and receiver, as provided for in the case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon.

Effect is to be given to the provisions of the law by regulations to be prescribed by the Commissioner of the General Land Office at Washington.

The first step, therefore, on the part of any person desiring to avail himself of the benefit of the law is the filing of a written statement which must be sworn to before the Register or Receiver, or which may be sworn to before a United States Commissioner designating the particular tract which the applicant *desires to purchase*, setting forth that the land is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited, contains no mining or other improvements except for ditch purposes, nor as deponent verily believes any valuable deposits of gold, silver, cinnabar, copper or coal; that deponent has made no other *application* under this Act; that he does not *apply to purchase* the same on speculation but in good faith to appropriate the land to his own exclusive use and benefit and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title which he might acquire from the Government of the United States should inure in

whole or in part to the benefit of any person except himself.
1169 If a person taking the oath to such statement swears falsely
in the premises the law subjects him to all the pains and penalties of perjury." As not the law and misleading, and calling the attention of the jury to a matter not charged in the indictment.

The defendants each of them also excepted to the giving of said instruction hereinbefore set forth reading as follows: "Now, when the sworn statement is filed, the Register posts a notice of the application, embracing a description of the land, in his office for a period of sixty days and furnishes the applicant a copy of the same for publication in a newspaper published nearest the location of the premises, for a like period of time. And it is provided by law, and by regulation duly made by proper authority and having the force and effect of law, that, after the expiration of said sixty days, the person or claimant desiring to purchase shall furnish to the register of the Land Office satisfactory evidence among other things, that notice of the application prepared by the Register was duly published in a newspaper as required by the law; that the land is of the character contemplated in the act; that the applicant has not sold or transferred his claim to the land since making his sworn statement, and has not, directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title he may acquire from the Government may inure, in whole or in part to the benefit of any person except himself; and that he makes his entry in good faith for the appropriation of the land exclusively for his own use and not for the use and benefit of any other person." As not the law and misleading and directing the attention of the jury to a matter not charged in the indictment.

Defendants each of them also then and there excepted to the giving of said instruction as hereinbefore set forth reading as
1170 follows: "But, as heretofore said, if he is not in good faith
and has directly or indirectly made any agreement or contract in any way or manner with any persons by which the title he may acquire from the United States shall inure in whole or in part to the benefit of any persons except himself, then he commits perjury in making his sworn statement, and in making a deposition that he has not done those things and any person who knowingly and wilfully procures and instigates the person to make such sworn statement or deposition is guilty of subornation of perjury," and especially to the words in said paragraph, 'and in making a deposition that he has not done those things;' upon the ground that the same is not the law and misleading and directs the attention of the jury to a matter not charged in the indictment.

Defendants also except to the giving of the instruction hereinbefore set forth which reads as follows: "The essential questions then for your determination are, does the evidence show, beyond a reasonable doubt that Williamson, Gesner and Biggs or two of them knowingly and intentionally, entered into an agreement or combination to induce or procure persons to apply to purchase and enter the lands as alleged, or some part of the lands charged in the indictment as lands subject to entry under the timber and stone act, after

having first come to an agreement or understanding, with such persons that they would convey the title which they might acquire to Williamson & Gesner or either of them: And next, does the evidence satisfy you beyond a reasonable doubt that these defendants, so combining and agreeing, intended that the persons or some of the persons, whom they might procure or induce to make such entries should wilfully and deliberately, in making their sworn statements or applications to purchase such lands at the time of making the first paper called a sworn statement or at the time of making their depositions or sworn statements when they made their final
1171 proofs before the United States Commissioner applying to purchase such lands, commit perjury by swearing falsely that their applications were not made on speculation, but in good faith to appropriate the lands to the exclusive use and benefit of the applicant or applicants and that the applicant or applicants had not, directly or indirectly, made any agreement or contract in any way or manner, by which the title to be acquired from the United States should inure in whole or in part to the benefit of any persons other than himself or herself." And especially to the words therein, "or some of the persons," and also to the words, "or at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner," as misleading and not the law, and applying to a matter not charged in the indictment and variant from said indictment.

Be it further remembered, That at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

A.

In order to constitute perjury there must be a wilful and corrupt making of a false statement and however false or untrue a statement may be, there can be no perjury if the person making the statement believes it to be true at the time of making it.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exceptions was allowed.

Be it further remembered, That thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to
1172 instruct the jury as follows:

B.

The suborning of perjury necessarily includes every element of actual perjury and in order to constitute that crime it is necessary that one person shall purposely and intentionally procure or induce another to commit perjury, that is to wilfully and corruptly and intentionally swear to something, which the party taking the oath does not believe to be true.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, That thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

C.

If the defendants believed that the persons who were to make the statements in question could do so truthfully and without stating a falsehood, they would not be guilty of the crime charged, however much they may have been mistaken as to the law or the facts.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, That thereupon and at the proper time under the rules of the court, the attorneys for the defendants
1173 on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

D.

If the defendants believed that the arrangement with the applicants for the land in question was within the law and that such applicants could truthfully make the statements in question, then they are not guilty of the crime charged, even if they were mistaken and the arrangement between them and the applicants were really in violation of the law.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, That thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

E.

Even if you should find that some one of the defendants intended to suborn perjury or even actually did so, that would not justify a conviction of the charge in this indictment unless you further find that two or more of these defendants, definitely planned and agreed among themselves to procure the alleged perjury.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each

of the defendants then and there excepted and their exception was allowed.

Be it further remembered, That thereupon and at the proper time under the rules of the court, the attorneys for the defendants
1174 on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

F.

Even if you find that perjury was committed by some one or more of the applicants in question, that would not justify a verdict of guilty unless you further find that at least two of the defendants conspired and agreed together to procure the perjury to be committed.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, That thereupon and at the proper time under the rules of court, the attorneys for defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

G.

The defendants are not charged with defrauding or attempting to defraud the Government, and therefore any mere attempt to evade the law upon their part (if there was any such attempt) would not justify a verdict of guilty unless there was actually a conspiracy or agreement between them to procure perjury.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, that thereupon and at the proper time under the rules of court, the attorneys for the defendants on
1175 behalf of each of said defendants separately, asked the court to instruct the jury as follows:

H.

If you have a reasonable doubt as to whether there was an agreement between the defendants to procure perjury to be committed, you should give them the benefit of the doubt.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Certain letters and declarations of certain of the defendants had been offered and admitted in evidence as against the defendant only who wrote such letter or made such declaration.

Be it further remembered, that thereupon and at the proper time under the rules of the court the attorneys, for the defendants on

behalf of each of said defendants separately, asked the court to instruct the jury as follows:

I.

Letters and declarations of certain of the defendants have been admitted in evidence, but before you can consider them as against any other defendant you must be satisfied beyond a reasonable doubt by other evidence independent of such statements that there was a conspiracy between the defendant making the statement and such other defendant to commit the crime.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

1176 Be it further remembered, that thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

J.

An applicant for timber land has a right to file on it with the intention of selling it at a profit after he has acquired title and such a filing would be for his own use and benefit, within the meaning of the law.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, that thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

K.

So the mere intention to sell at a profit at some future time would not be "on speculation" within the meaning of the law.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, that thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court

1177 to instruct the jury as follows:

L.

Even if the applicant expected to sell the land to some particular person whom he knew to be buying timber land in that locality, it would be no violation of the law unless there was an actual contract to make the sale.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, that thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

M.

An applicant for timber land has a right to borrow money to prove up on his land and if necessary to mortgage the land to secure payment, and this would be no violation of the law.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, that thereupon and at the proper time under the rules of court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

N.

He may also loan money to applicants to enable them to
1178 prove up, with the intention of buying it if possible, after title is secured, and if there is no actual contract for the sale of the land, his action in so doing would be lawful.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, that thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

O.

The charge in the indictment is that there was an agreement between the defendants, general in its character, to suborn *a large number of persons* to commit perjury. An agreement to suborn one or two persons only would not sustain the indictment even if it were proven.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, That thereupon and at the proper time under the rules of the court, the attorneys for the defendants on

behalf of each of said defendants separately, asked the court to instruct the jury as follows:

P.

The fact that a grand jury has found an indictment in this case should not be permitted to influence you in the least. The
1179 grand jury may hear only one side of the case, and the defendants had no opportunity to appear before that body and cross examine the witnesses, and as I have said its decision ought not to affect your judgment.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, that thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

Q.

If you find from the evidence that Gesner expressly refused to make a contract and did not intend to make any contract or agreement with the applicants for the purchase of the lands; the mere fact that he expected or intended to purchase it at some future time, and that the applicants or some of them intended to sell to him if they could not do better (if you find these to be the facts) would not make an agreement which would be in violation of the law.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, that thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

1180 R.

The charge in this indictment is that the oath of the applicants in question was intended to be false in the matter of the alleged contract to convey to Gesner and Williamson and you must base your findings upon that charge alone.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

There was evidence in the case tending to show that the final proof of some of the applicants were false as to the character of the land and the quantity of timber contained thereon and also as to the manner of obtaining the money with which to pay for the land.

Be it further remembered, that thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

S.

There is no charge in the indictment, that the alleged oaths that the applicants were to take, were false as to the character of the land or as to the manner of obtaining the money with which to pay for it.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

1181 Be it further remembered, That thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

T.

Even if you should believe therefore that the applicants or some of them were inaccurate or testified falsely as to where or how they obtained the money to prove up on their claims, that alone would not be sufficient to sustain a verdict of guilty in this cause.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, that thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

U.

So there is no charge in the indictment of any intended falsity in the oaths of the applicants as to the amount or quality of timber on the different claims, and even if you should believe from the evidence that there was some inaccuracy or falsity in that regard, in the oaths or proofs of some of the applicants, that would not be sufficient to sustain a conviction.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their ex-

1182 ception was allowed.

Be it further remembered, that at the proper time under the rules of the court the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

V.

Indeed it is alleged in the indictment that the lands in question were "subject to filing under the timber and stone act" and this necessarily implies that they were chiefly valuable for timber and stone and you must assume for the purpose of this case that this is true. The indictment being based upon this theory the Government is now estopped from claiming otherwise.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

There was evidence in the case tending to show that statements made by each of the defendants in their own final proof, was or might have been false.

Be it further remembered, that at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

W.

The defendants are not charged with perjury in the matter of their own applications or final proofs and they are not on trial therefor as to such applications and proofs. You cannot therefore find them either guilty or not guilty as to the matter of the state-
1183 ments made in the matter of their own claims.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

In connection with the charge in relation to the taking of advice from lawyers given by the court:

Be it further remembered, that thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

X.

In such case the mere fact that one of the lawyers to whom he applied for advice, was included with him in this indictment would make no difference as to his rights in the matter.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, that thereupon and at the proper time under the rules of the court the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

Y.

In this case the indictment charges conspiracy to suborn perjury in the matter of the sworn statement or applications and not in the matter of the final proofs.

1184 But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, that thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

Z.

Experience in the administration of justice makes it proper for courts to advise juries that the testimony of an accomplice should be received with great caution, and should be carefully scrutinized. This is because of the position which he takes, as confessing contamination with guilt, and admitting participation in the very crime which he endeavors by his testimony to fix upon the person on trial.

But the court refused to give said instruction and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

Be it further remembered, that thereupon and at the proper time under the rules of the court, the attorneys for the defendants on behalf of each of said defendants separately, asked the court to instruct the jury as follows:

AA.

There has been evidence admitted tending to show the purchase of certain school lands by some of the defendants. Whether

1185 or not there was anything irregular or illegal in such purchases, the defendants are now on trial therefor, and you cannot find them either guilty or innocent thereon.

But the court refused to give said instructions and did not give the same except in so far as the same may be covered by the general charge hereinbefore set forth, and to such failure and refusal each of the defendants then and there excepted and their exception was allowed.

1186 And be it further remembered, that after the verdict in said cause and when the court was about to pronounce sentence upon the defendant the said defendant John Newton Williamson objected and protested against the court passing sentence upon him, and especially to any sentence of imprisonment on the ground that such sentence would necessarily interfere with his going to and coming from the sessions of Congress during his term and from his attendance thereon as member of such Congress of the United States, and would be in violation of his constitutional privilege and immunity of freedom from arrest while going to and coming from and attending such sessions, but the court overruled and denied said ob-

jection and proceeded to pass sentence upon said defendant as otherwise shown by the record herein, and the said defendant John Newton Williamson then and there excepted to said ruling of the court denying and overruling said objection and to the sentence of the court providing for his imprisonment in said cause, and his said exceptions were allowed.

1187 Be it further remembered, that said defendant John Newton Williamson appeared for trial in said cause without arrest and without compulsion or other process. A verbal notice was given to him by the Honorable District Attorney that he would be expected and required to appear for trial at a certain time stated therein. He was never put under bond until after conviction.

1188 And this bill of exceptions having been duly presented to the Court and having been amended to correspond to the facts is now signed and made a part of the records in said cause.

Dated this 10th day of July, A. D. 1906.

(Signed) WILLIAM H. HUNT, *Judge.*

U. S. Circuit Court, Filed Jul- 1906. J. A. Sladen, Clerk. District of Oregon.

1189 And afterwards, to wit, on Tuesday, the 14th day of August 1906 the same being the 108th Judicial day of the Regular April Term of said Court; Present: the Honorable William B. Gilbert United States Circuit Judge presiding, the following proceedings were had in said cause, to-wit:

1190 In the Circuit Court of the United States for the District of Oregon.

No. 2914.

UNITED STATES OF AMERICA, Plaintiff,

vs.

JOHN NEWTON WILLIAMSON, VAN GESNER, and MARION R. BIGGS, Defendants.

Whereas, the above named defendant, John Newton Williamson, has filed a petition for a writ of error in the above entitled cause from the United States Supreme Court to the above entitled Court, and

Whereas, said writ has been allowed, and the assignments of error filed and citations issued and served, and a writ of error issued in said cause, and

Whereas, it is impossible to perfect and prepare the transcript therein within the time heretofore allowed by the order of the Circuit Judge;

Now, therefore, the time for returning said writ and for preparing and transmitting the record in said cause to the above named

United States Supreme Court is hereby extended until the first day of September, 1906.

Dated at Portland, Oregon this 13th day of August, 1906.

WM. B. GILBERT,
Circuit Judge.

Filed April 14, 1906. J. A. Sladen, Clerk U. S. Circuit Court District of Oregon.

1191 UNITED STATES OF AMERICA, *District of Oregon, ss:*

I, J. A. Sladen, Clerk of the Circuit Court of the United States for the District of Oregon, by virtue of the foregoing Writ of Error and in obedience thereto, do hereby certify that the foregoing pages numbered from 4 to 1190 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of The United States of America, Plaintiff, and Defendant in Error,—*vs.*—John Newton Williamson, Defendant, and Plaintiff in Error, as the same appear of record and on file at my office and in my custody.

In Testimony Whereof I have hereunto set my hand and affixed the Seal of said Court, at Portland, in said District, on this 24th day of August, A. D. 1906.

[Seal United States Circuit Court, Oregon.]

J. A. SLADEN, *Clerk.*

Endorsed on cover: File No. 20,359. Oregon, C. C. U. S. Term No. 96. John Newton Williamson, plaintiff in error, *vs.* The United States. Filed September 7, 1906. File No. 20,359.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

JOHN NEWTON WILLIAMSON, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 394.

IN ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON.

MOTION TO ADVANCE.

The Solicitor-General, on behalf of the United States, respectfully moves the court to advance the above-entitled case for hearing at an early day convenient to the court; and, for grounds of motion, assigns the following:

On February 11, 1905, John Newton Williamson, the plaintiff in error, together with Van Gesner and Marion R. Biggs, were indicted for conspiracy to suborn perjury in the acquisition of lands of the United States under the acts of June 3, 1878, and August 4, 1892, by procuring a large number of persons to appear before Biggs, who was a United States

commissioner for the district of Oregon, and to swear falsely that they were taking up the land for their own use and benefit. In truth the lands were taken up for the sole use and benefit of the firm of Williamson & Gesner, of which two of the defendants were members, said firm being engaged in the business of raising sheep in the vicinity of said lands. The indictment is based on section 5440, Revised Statutes, and contains nineteen counts.

On September 27, 1905, the jury returned a verdict of guilty as to all defendants. After motions for a new trial and in arrest of judgment were denied, the court, on October 14, 1905, sentenced the defendant Williamson to pay a fine of five hundred dollars and to be imprisoned for a term of ten months; the defendant Gesner to pay a fine of one thousand dollars and to be imprisoned for a term of five months; the defendant Biggs to pay a fine of five hundred dollars and to be imprisoned for a term of ten months. Before the sentence was passed upon him the defendant Williamson objected and protested against the court passing sentence upon him, especially a sentence of imprisonment, upon the ground that such sentence would necessarily interfere with his going to and from the sessions of Congress during his term as a Member of said Congress and would be in violation of his constitutional privilege and immunity from arrest by going to and attending such sessions. This objection was overruled. The bill of exceptions affirmatively shows that Williamson was tried and convicted during a recess of Congress, that he

appeared for trial without arrest and without compulsion or other process, and that he was never put under bond until after conviction.

A writ of error was sued out of the Circuit Court of Appeals for the Ninth Circuit by all three of the defendants, Williamson, Gesner, and Biggs. Williamson, however, sued out an independent writ of error from this court upon the ground that a constitutional question was involved in his case. On March 11, 1907, the Circuit Court of Appeals dismissed the writ of error as to Williamson because of the writ of error from this court and affirmed the judgment of the Circuit Court against Gesner and Biggs.

The motion to advance is submitted for the following reasons:

First. This is a criminal case.

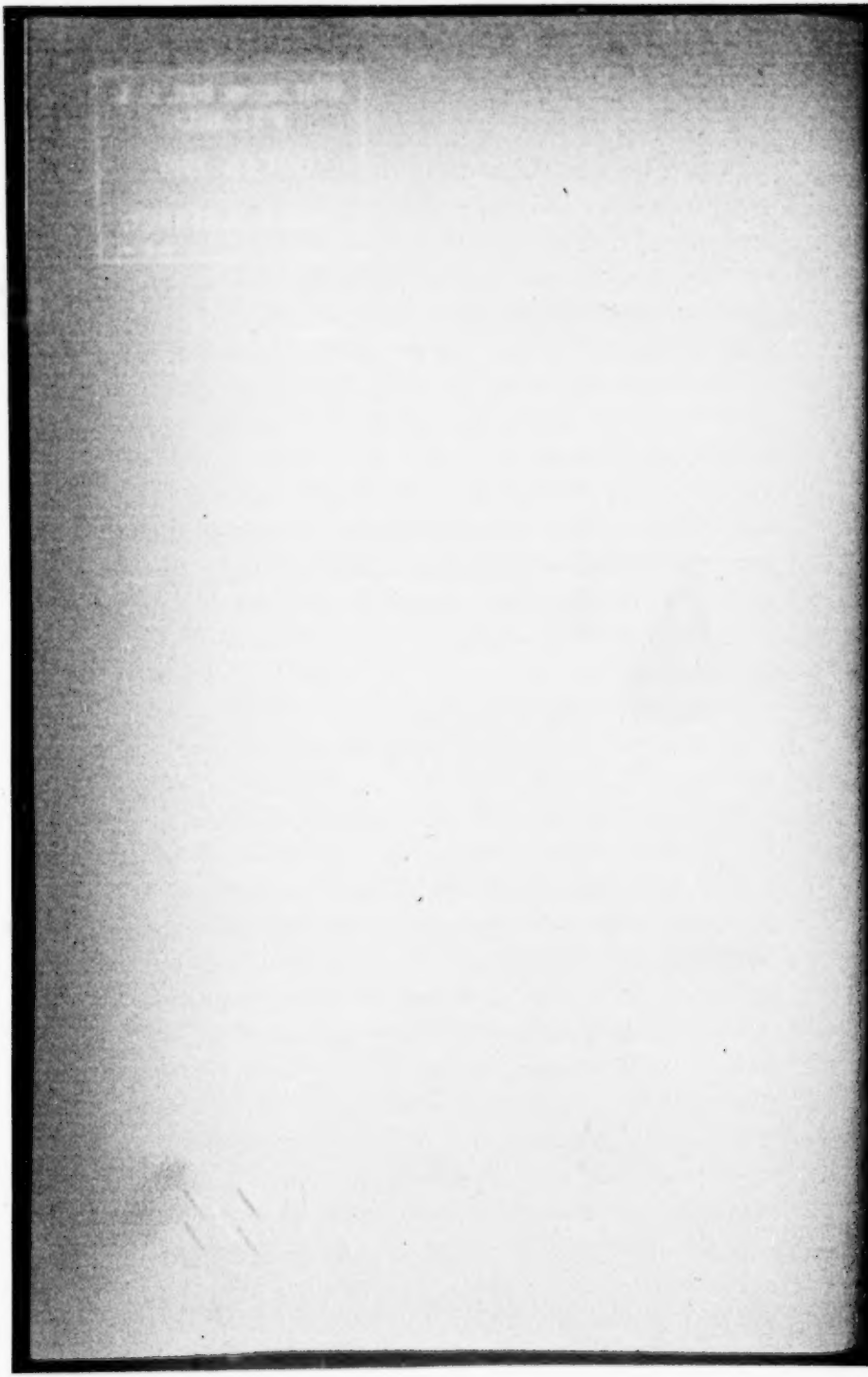
Second. A constitutional question appears to be involved.

Third. It is a case of public importance, involving the question whether the immunity from arrest granted to Senators and Members of Congress by the Constitution extends to a sentence of imprisonment after a legal conviction.

Fourth. An independent writ of error from the Circuit Court of Appeals has been dismissed by that court as to Williamson.

HENRY M. HOYT,
Solicitor-General.

O



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 96.

JOHN NEWTON WILLIAMSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

This case is here on a writ of error to the Circuit Court of the United States for the District of Oregon.

The plaintiff in error, John N. Williamson, who was then a member of the House of Representatives of the United States, was indicted February 11, 1905, together with Van Gesner and Marion R. Biggs, under an indictment which attempted to charge them with conspiring to commit an offense against the United States, in violation of section 5440 of the Revised Statutes.

The indictment will be found on pages 3 to 10 of the Record. Stripped of some of its verbiage, it alleges that on June 30, 1902, at Prineville, Oregon, Williamson, Gesner,

and Biggs conspired together, and with divers other persons to the grand jurors unknown, to suborn, instigate, and procure a large number of persons, to wit, one hundred persons, to go in person before the defendant Biggs, who was then and there a United States commissioner for the District of Oregon, and, after being sworn by him, as such United States commissioner, to state and subscribe under their oaths that certain public lands of the United States, lying in Crook County, in the District of Oregon, open to entry and purchase under the acts of Congress of June 3, 1878, and August 4, 1892, and known as timber and stone lands, which said persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith, to be appropriated to their own exclusive use and benefit, and that they had not made any agreement with any person or persons by which the titles which they might acquire from the United States to such lands should inure in whole or in part to the benefit of any person except themselves, when in fact, as said persons would then well know, and as Williamson, Gesner, and Biggs would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate them to their own exclusive use and benefit, respectively, and would have made agreements with Williamson, Gesner, and Biggs by which the titles which they might acquire from the United States to such lands would inure to the benefit of Williamson and Gesner—the matters so to be stated, subscribed and sworn to by said persons being material matters under the circumstances and matters which the persons so to be suborned, instigated, and procured, and Williamson, Gesner, and Biggs, would not believe to be true—the said Biggs when administering said oaths being an officer authorized by the laws of the United States to administer said oaths, and said oaths being administered in cases where a law of the United States would then authorize an oath to be administered.

Nineteen overt acts are alleged, each being the preparation by the defendant Biggs, at Prineville, Oregon, on June 30, 1902, of a sworn statement under the timber and stone land act of June 3, 1878, the several statements being alleged as prepared for the respective signatures of nineteen persons named, each of whom is said to be "one of the persons who were to be suborned, etc., in the manner aforesaid."

On April 15, 1905, the plaintiff in error demurred to the indictment (Rec., 13, 14). His demurrer was overruled June 26, 1905 (Rec., 15), and on July 7 he entered a plea of not guilty (Rec., 15, 16).

The trial began September 5, 1905, before Hon. William H. Hunt, United States District Judge for the District of Montana.

To support the averments of the indictment, the Government offered no direct evidence of conspiracy among the defendants, or that they had acted upon any actual agreement or by any actual concert. The reliance of the prosecution was solely upon proof of certain acts of the defendants and other persons, from which the jury was persuaded to infer that the defendants had conspired to procure others to commit perjury in a number of applications to enter public land under the timber and stone land act of 1878.

In and before the year 1902, as appeared from evidence adduced at the trial and incorporated in the bill of exceptions, the defendants Williamson and Gesner had been partners in the business of sheep-raising. For range purposes they used some tracts owned and leased by the firm, and their sheep were pastured also upon the vacant public lands in Crook County (Rec., 396).

In the early part of 1902, an unusually large number of tracts in that county were entered under the timber and stone land act. These entries were made, for the most part, by residents of the Eastern States, who came for that purpose to Oregon by car-loads, and to Prineville by stage-loads, as

witnesses for the Government stated. On this and some other accounts, Dr. Gesner, who was alone concerned in the active management of the business, found his use of the range curtailed, and threatened with further impairment. With a view to securing the use of other lands, he consulted the defendant Biggs, who was a reputable attorney at Prineville, with reference particularly to the arrangements which might legitimately be made with persons intending to make entries of timber land. Biggs advised him that it would be proper to advance money to such persons for the purchase of the lands, and also that there would be no illegality in declaring a willingness to buy the lands after titles should be obtained. The same advice was given by another attorney, Barnes, whom Gesner consulted (Rec., 400).

Acting upon this advice, Gesner stated to a number of persons, his friends and neighbors in Crook County, that he desired to obtain the use of additional land for pasturage. To these persons he offered to advance sufficient money to pay the purchase price and other costs of obtaining tracts of land, and to demand no interest so long as he should be permitted to use the lands for grazing. To some of them he said that, in case they desired to sell, the land would be worth to him as much as $500 for each tract of 160 acres, which sum was slightly in excess of the cost of obtaining title.

Some of the persons thus addressed by Gesner, and divers others to whom his disposition had been indirectly made known, made applications to enter lands under the act of 1878. In some of these cases Gesner, as he had offered to do, loaned the necessary money to the applicants, securing the loans by notes and mortgages, and agreeing to accept the privilege of grazing his sheep upon the land in lieu of interest. In most, if not all, cases, he declared that he would not and could not make any agreement for the purchase of the land, but stated that he would be willing, if the entry-

men desired to sell, to pay $500 for each quarter section. It does not appear that any of the entrymen promised to sell to Gesner, or expressed to him any intention to sell at $500 or any other price, or that any of them was asked to make any such promise or to express any such intention.

Williamson, at the time these transactions were in progress and for about two years before, was and had been resident at The Dalles, about 100 miles from Prineville. In June, 1902, shortly before the date assigned for the alleged conspiracy, and in the month during which the alleged unlawful acts were done, he was nominated as a candidate for the office of Representative in Congress. For several months before and for at least six weeks after that event, he was engrossed in canvassing for the nomination and for the election. During this period he made but four or five brief visits to Crook County. He testified at the trial that he knew that his partner was making loans on timber lands, but was never informed of any negotiations for the purchase of such lands. On this point he was corroborated by Gesner, and there was no evidence purporting to prove the contrary.

During the course of the trial numerous exceptions were taken on behalf of plaintiff in error to the action of the court in admitting and rejecting evidence, and in granting and refusing instructions to the jury. These exceptions are embodied in the bill of exceptions, and the errors of the court are specifically pointed out in subsequent portions of this brief, in the assignment of errors and in the argument in connection with the various errors.

September 27, 1905, the jury returned a verdict of guilty as to each of the defendants (Rec., 31).

On October 7, the plaintiff in error filed motions for a new trial and in arrest of judgment (Rec., 32, 33); these motions were overruled October 14, and sentence was passed by the court on plaintiff in error on the same day.

When the court was about to pronounce sentence, plaintiff in error objected to the passing of any sentence upon him,

and especially any sentence of imprisonment, on the ground that such sentence would necessarily interfere with his attendance upon the sessions of the Congress of the United States during his term, and in going to and returning from the same, and would be in violation of the right guaranteed to him under the Constitution of the United States as a member of Congress, to be privileged from arrest during his attendance at the sessions of Congress and in going to and returning from the same (Rec., 705).

The court overruled the objection, and on October 14 passed sentence on plaintiff in error, directing that he pay a fine of $500, and be imprisoned for a term of ten months (Rec., 34). To this action the plaintiff in error duly excepted (Rec., 706). An order was passed on the same day staying the execution of the judgment until the further order of the court (Rec., 34).

On April 12, 1906, the plaintiff in error filed in the Circuit Court for the District of Oregon a petition for a writ of error from this court (Rec., pp. 35-65). Circuit Judge William B. Gilbert passed an order on the same day allowing the writ and staying execution of the sentence until the disposition of the case by this court (Rec., 68).

The jurisdiction of this court is clear by reason of the question of constitutional privilege presented, and the existence of such a question in the record gives the court jurisdiction over the case as a whole.

Burton *v.* United States, 196 U. S., 283.

In accordance with the intimation in the Burton Case that this court prefers to determine such a case upon other points than the constitutional question, the ensuing argument proceeds, in the first instance, upon other than constitutional matters.

Assignment of Errors.

(1) The court erred in overruling the demurrer to the indictment (Rec., 15).

(2) The court erred in holding that the indictment charged a conspiracy to procure the commission of perjury in the making of final proofs (Rec., 394).

(3) The court erred in admitting evidence tending to prove the commission of perjury by John F. Watkins, Joel Calavan, Christian Feuerhelm, Laura Biggs, S. V. Williamson, Ora F. Parker, Sarah Parker, Robert B. Foster, Laura A. Foster, Josiah Hinkle, Charles Graves, and Monia Graves, and by each of them, at the time of making final proof (Rec., 139, 143, 158 (Watkins); 168, 169, 170 (Calavan); 249, 250, 251 (Feuerhelm); 394 (others).

(4) The court erred in admitting evidence of the making of final proof by John F. Watkins, Joel Calavan, and Christian Feuerhelm, and by each of them (Rec., 132, 139, 140 (Watkins); 163, 168 (Calavan); 243, 251 (Feuerhelm).

(5) The court erred in admitting in evidence the final proof papers of John F. Watkins, Joel Calavan, and Christian Feuerhelm, and of each of them (Rec., 132, 139, 140 (Watkins); 163, 168 (Calavan); 243, 251 (Feuerhelm).

(6) The court erred in admitting evidence of the making of final proof by Laura Biggs, S. V. Williamson, Ora F. Parker, Sarah Parker, Robert B. Foster, Laura A. Foster, Josiah Hinkle, Charles Graves, and Monia Graves, and by each of them (Rec., 394).

(7) The court erred in admitting in evidence the final proof papers of Laura Biggs, S. V. Williamson, Ora F.

Parker, Sarah Parker, Robert B. Foster, Laura A. Foster, Josiah Hinkle, Charles Graves, and Monia Graves, and of each of them (Rec., 394).

(8) The court erred in overruling the motion to strike out all of the testimony introduced by the Government in regard to the making of final proofs, and in regard to the contents of such proofs (Rec., 394).

(9) The court erred in instructing the jury as follows:

> "Now, when the sworn statement is filed, the register posts a notice of the application, embracing a description of the land, in his office for a period of sixty days, and furnishes the applicant a copy of the same for publication in the newspaper published nearest the location of the premises for a like period of time. And it is provided by law, and by regulation duly made by proper authority and having the force and effect of law, that after the expiration of said sixty days the person or claimant desiring to purchase shall furnish to the register of the land office satisfactory evidence, among other things, that notice of the application prepared by the register was duly published in a newspaper as required by the law; that the land is of the character contemplated in the act; that the applicant has not sold or transferred his claim to the land since making his sworn statement, and has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whomsoever, by which the title he may acquire from the Government may inure, in whole or in part, to the benefit of any person except himself; and that he makes his entry in good faith for the appropriation of the land exclusively for his own use, and not for the use and benefit of any other persons" (Rec., 688, 696).

(10) The court erred in instructing the jury as follows:

> "But, as heretofore said, if he is not in good faith, and has directly or indirectly made any agreement or contract in any way or manner with any person by

which the title he may acquire from the United States will inure in whole or in part to the benefit of any persons except himself, then he commits perjury in making his sworn statement, and in making a deposition that he has not done those things; and any person who knowingly and willfully procures and instigates the person to make such sworn statement or deposition is guilty of subornation of perjury" (Rec., 691, 696).

(11) The court erred in instructing the jury as follows:

"The essential questions, then, for your determination are, does the evidence show, beyond a reasonable doubt, that Williamson, Gesner and Biggs, or two of them, knowingly and intentionally entered into an agreement or combination to induce or procure persons to apply to purchase and enter the lands as alleged, or some part of the lands charged in the indictment as lands subject to entry under the timber and stone act, after having first come to an agreement or understanding with such persons that they would convey the title which they might acquire to Williamson and Gesner, or either of them; and, next, does the evidence satisfy you, beyond a reasonable doubt, that these defendants, so combining and agreeing, intended that the persons, or some of the persons, whom they might procure or induce to make such entries should willfully and deliberately, in making their sworn statements or applications to purchase such lands at the time of making the first paper, called a sworn statement, or at the time of making their final proofs before the United States Commissioner, applying to purchase such lands, commit perjury by swearing falsely that their applications were not made on speculation, but in good faith to appropriate the lands to the exclusive use and benefit of the applicant or applicants, and that the applicant or applicants had not, directly or indirectly, made any agreement or contract in any way or manner, by which the title to be acquired from the United States should inure in whole or in part to the benefit of any persons other than himself or herself" (Rec., 691, 696, 697).

(12) The court erred in refusing to instruct the jury as follows:

> "In this case the indictment charges conspiracy to suborn perjury in the matter of the sworn statement or applications, and not in the matter of the final proofs" (Rec., 705).

(13) The court erred in admitting evidence tending to show the commission of perjury by Marion R. Biggs, Sarah V. Williamson, John N. Williamson, O. L. Parker, Charles A. Graves, M. Graves, N. O. Jones, Jeff Evans, Ernest Starr, Henry Hudson, and Christian Feuerhelm, and by each of them, in their applications and final proofs in regard to the character as to timber of the land entered (Rec., 248, 249, 298–304, 325–327, 346, 347, 355–358, 377–380, 393, 661, 662, 666, 667).

(14) The court erred in admitting evidence tending to show that the lands entered by Marion R. Biggs, Sarah V. Williamson, John N. Williamson, O. L. Parker, Charles A. Graves, M. Graves, N. O. Jones, Jeff Evans, Ernest Starr, Henry Hudson, and Christian Feuerhelm, and by each of them, were not of such character as to be subject to entry under the act of June 3, 1878 (Rec., 248, 249, 298–304, 325–327, 346, 347, 355–358, 377–380, 393, 661, 662, 666, 667).

(15) The court erred in admitting in evidence photographs of the respective claims of Marion R. Biggs, Sarah V. Williamson, John N. Williamson, O. L. Parker, Charles A. Graves, M. Graves, N. O. Jones, and Jeff Evans, and in admitting in evidence each of said photographs (Rec., 298, 299, 300 (Biggs); 298, 300, 301 (S. V. Williamson); 298, 301, 302 (J. N. Williamson); 298, 302, 303 (Parker); 298, 303 (C. A. and M. Graves); 298, 303, 304 (Jones); 298, 378 (Evans)).

(16) The court erred in admitting the evidence of the witness David Edgar tending to show that the claims of Marion R. Biggs, S. V. Williamson, J. N. Williamson, O. L. Parker, C. A. Graves, M. Graves, N. O. Jones, Ernest Starr, Henry Hudson, and Christian Feuerhelm, and of each of them, were not chiefly valuable for timber, and were not of such character as to be subject to entry under the act of June 3, 1878 (Rec., 325–327).

(17) The court erred in admitting the evidence of the witness John C. Murray tending to show that the claims of Ernest Starr, S. V. Williamson, Marion R. Biggs, and John N. Williamson, and of each of them, were not chiefly valuable for timber, and were not of such character as to be subject to entry under the act of June 3, 1878 (Rec., 325, 346, 347).

(18) The court erred in admitting the evidence of the witness William J. Mitchell, tending to show that the claims of Ernest Starr, S. V. Williamson, Marion R. Biggs, J. N. Williamson, O. L. Parker, Jeff Evans, Henry Hudson, and Christian Feuerhelm, and of each of them, were not chiefly valuable for timber, and were not of such character as to be subject to entry under the act of June 3, 1878 (Rec., 325, 355-358, 377, 378, 379, 380, 393).

(19) The court erred in refusing to instruct the jury as follows:

> "The charge in this indictment is that the oath of the applicants is question was intended to be false in the matter of the alleged contract to convey to Gesner and Williamson, and you must base your findings upon that charge alone" (Rec., 702).

(20) The court erred in refusing to instruct the jury as follows:

> "There is no charge in the indictment that the alleged oaths that the applicants were to take were

false as to the character of the land or as to the manner of obtaining the money with which to pay for it" (Rec., 703).

(21) The court erred in refusing to instruct the jury as follows:

> "So there is no charge in the indictment of any intended falsity in the oaths of the applicants as to the amount or quality of timber on the different claims, and even if you should believe from the evidence that there was some inaccuracy or falsity in that regard, in the oaths or proofs of some of the applicants, that would not be sufficient to sustain a conviction" (Rec., 703).

(22) The court erred in refusing to instruct the jury as follows:

> "Indeed, it is alleged in the indictment that the lands in question were 'subject to filing under the timber and stone act,' and this necessarily implies that they were chiefly valuable for timber and stone, and you must assume for the purpose of this case that this is true. The indictment being based upon this theory, the Government is now estopped from claiming otherwise" (Rec., 704).

(23) The court erred in refusing to instruct the jury as follows:

> "The defendants are not charged with perjury in the matter of their own applications or final proofs, and they are not on trial therefor as to such applications and proofs. You cannot, therefore, find them either guilty or not guilty as to the matter of the statements made in the matter of their own claims" (Rec., 704).

(24) The court erred in admitting evidence tending to show unlawful conduct of plaintiff in error in connection with the acquisition of school lands from the State of Oregon (Rec., 620, 621, 627, 630, 631, 632, 673, 674).

(25) The court erred in admitting in evidence the letter from the defendant Gesner to M. L. Chamberlain, dated June 23, 1902, and the reply of M. L. Chamberlain thereto, dated June 25, 1902 (Rec., 620).

(26) The court erred in admitting in evidence the application of Sarah M. Gerowe to the State Land Board of Oregon to purchase certain State lands (Rec., 620, 621, 673).

(27) The court erred in admitting in evidence copy of deed for certain lands from the Oregon State Land Board to Williamson, Wakefield, and Gesner (Rec., 621, 673, 674).

(28) The court erred in admitting the testimony of the witness L. P. Perry, tending to prove that the defendant Gesner solicited him to apply to the State of Oregon to purchase certain school land for Gesner's benefit (Rec., 627, 628).

(29) The court erred in admitting the testimony of the witness Mary Swearingen, tending to prove that the defendant Gesner induced her to apply to the State of Oregon to purchase certain school lands for Gesner's benefit (Rec., 630, 631).

(30) The court erred in admitting in evidence the copy of the application of Mary J. Swearingen to the State Land Board of Oregon to purchase certain lands (Rec., 632, 633).

(31) The court erred in admitting in evidence the deed for certain land from the State Land Board of Oregon to Mary A. Swearingen (Rec., 673).

(32) The court erred in refusing to instruct the jury as follows:

> "There has been evidence admitted tending to show the purchase of certain school lands by some of

the defendants. Whether or not there was anything irregular or illegal in such purchases, the defendants are not on trial therefor, and you cannot find them either guilty or innocent thereon."

(33) The court erred in permitting each of the witnesses Ben Jones, Green Beard, John F. Watkins, Joel Calavan, W. J. Crain, Jeff Evans, Henry Hudson, and Christian Feuerhelm to testify what his own intention was with regard to the disposal of the lands entered by him at the time he filed his application (Rec., 71, 75 (Jones); 104, 109 (Beard); 132, 138 (Watkins); 163, 167 (Calavan); 181, 184 (Crain); 197, 201 (Evans); 219, 222 (Hudson); 243, 247 (Feuerhelm)).

(34) The court erred in permitting the witness Ben Jones to testify what his own intention was with regard to the disposal of the lands entered by him at the time he made his final proof (Rec., 71, 81).

(35) The court erred in permitting each of the witnesses Joel Calavan, W. J. Crain, Henry Hudson, and Christian Feuerhelm to testify as to his understanding of the arrangement existing between him and the defendant Gesner as to the disposal of the lands entered by him (Rec., 163, 166 (Calavan); 181, 184 (Crain); 219, 222 (Hudson); 243, 258 (Feuerhelm)).

(36) The court erred in refusing to permit the witness Green Beard to testify as to his understanding of the arrangement existing between him and the defendant Gesner as to the disposal of the land entered by him (Rec., 121).

(37) The court erred in refusing to instruct the jury as follows:

"The suborning of perjury necessarily includes every element of actual perjury, and in order to constitute that crime it is necessary that one person shall

purposely and intentionally procure or induce another to commit perjury; that is, to willfully and corruptly and intentionally swear to something which the party taking the oath does not believe to be true" (Rec., 697).

(38) The court erred in refusing to instruct the jury as follows:

"If the defendants believed that the persons who were to make the statements in question could do so truthfully, and without stating a falsehood, they would not be guilty of the crime charged, however much they may have been mistaken as to the law or the facts" (Rec., 698).

(39) The court erred in refusing to instruct the jury as follows:

"If the defendants believed that the arrangement with the applicants for the land in question was within the law, and that such applicants could truthfully make the statements in question, then they are not guilty of the crime charged, even if they were mistaken and the arrangement between them and the applicants was really in violation of the law (Rec., 698).

(40) The court erred in instructing the jury as follows:

"The offense is sufficiently proved if the jury is satisfied from the evidence, beyond a reasonable doubt, that two or more of the parties charged, in any manner or through any contrivance, positively or tacitly came to a mutual understanding to accomplish a common and unlawful design, followed by some act done by any one of the parties for the purpose of carrying it into execution" (Rec., 685, 694).

(41) The court erred in refusing to instruct the jury as follows:

"Even if you should find that some one of the defendants intended to suborn perjury, or even actually

did so, that would not justify a conviction of the charge in this indictment, unless you further find that two or more of these defendants definitely planned and agreed among themselves to procure the alleged perjury" (Rec., 698).

(42) The court erred in refusing to instruct the jury as follows:

"Even if you find that perjury was committed by some one or more of the applicants in question, that would not justify a verdict of guilty, unless you further find that at least two of the defendants conspired and agreed together to procure the perjury to be committed" (Rec., 699).

(43) The court erred in instructing the jury as follows:

"The defendants are not charged with defrauding or attempting to defraud the Government, and therefore any mere attempt to evade the law upon their part (if there was any such attempt) would not justify a verdict of guilty unless there was actually a conspiracy or agreement between them to procure perjury" (Rec., 699).

(44) The court erred in admitting the evidence of the witnesses Duncan, Adams, and Ray, and each of them, tending to contradict the defendants' witness Branton on a collateral and immaterial matter brought out on the cross-examination of Branton (Rec., 585, 593, 615).

(45) The court erred in overruling the motion in arrest of judgment (Rec., 34).

(46) The court erred in overruling the objection of plaintiff in error to the pronouncing of sentence upon him, and especially to the pronouncing of sentence of imprisonment, on the ground that such sentence would interfere with his attendance upon the sessions of the Congress of the United States, and would interfere with his going to and returning

from such sessions, and would deprive him of the privileges and immunities guaranteed to him, as a Member of the Congress of the United States, by the Constitution of the United States, to be free from arrest during his attendance at the sessions of Congress, and in going to and returning from the same (Rec., 705).

(47) The court erred in pronouncing judgment on the verdict, and in sentencing plaintiff in error to be imprisoned (Rec., 34).

(48) The court erred in sentencing plaintiff in error to be imprisoned, notwithstanding his claim, as a Member of the Congress of the United States, that he was, by the Constitution of the United States, privileged from arrest and imprisonment during his attendance at the sessions of Congress, and in going to and returning from the same (Rec., 705).

ARGUMENT.

We propose to discuss, in the order named:

(1) The indictment.

(2) The exceptions taken during the course of the trial to the action of the court in admitting and in rejecting evidence, and in granting and refusing instructions to the jury.

(3) The whole case; and under this head to show (*a*) that there was no proof of the making of any unlawful contracts; (*b*) that there was no sufficient proof that the plaintiff in error was connected with the alleged conspiracy, and (*c*) that there was no proof of any of the overt acts alleged in the indictment.

(4) The constitutional privilege of plaintiff in error to be exempt from arrest and imprisonment during his attendance at the sessions of Congress and in going to and returning from the same.

I.

The Indictment.

The indictment is based on section 5440 of the Revised Statutes of the United States, and attempts to charge a conspiracy to commit an offense against the United States. Exclusive of the averments of overt acts, it reads as follows:

> "The grand jurors of the United States of America, inquiring for the District of Oregon, upon their oath present, that John Newton Williamson, Van Gessner and Marion R. Biggs, late of the city of Prineville, in the district aforesaid, on the thirtieth day of June, in the year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did conspire, combine, confederate and agree together, and with divers other persons to the said grand jurors unknown, to commit an offense against the said

United States, that is to say, to unlawfully, wilfully and corruptly suborn, instigate, and procure a large number of persons, to wit, one hundred persons, to commit the offense of perjury in the said district, by taking their oaths there respectively before a competent officer and person in cases in which a law of the said United States authorized an oath to be administered, that they would declare and depose truly that certain declarations and depositions by them to be subscribed were true, and by thereupon, contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be true; that is to say, to suborn, instigate and procure the said persons respectively to come in person before him the said Marion R. Biggs, who was then and there a United States commissioner for the said District of Oregon, and, after being duly sworn by and before him the said Marion R. Biggs, as such United States Commissioner, to state and subscribe under their oaths that certain public lands of the said United States, lying in Crook County, in said District of Oregon, open to entry and purchase under the acts of Congress approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons respectively, and that they had not directly or indirectly made any agreement or contract in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner, and Marion R. Biggs would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit respectively, and would have made

> agreements and contracts with them the said John Newton Williamson, Van Gesner and Marion R. Biggs by which the titles which they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, as copartners, in the firm of Williamson and Gesner, then and before then engaged in the business of sheep raising in said county; the matters so to be stated, subscribed and sworn by the said persons being material matters under the circumstances, and matters which the said persons so to be suborned, instigated and procured, and the said John Newton Williamson, Van Gesner and Marion R. Biggs would not believe to be true; and the said Marion R. Biggs, United States commissioner as aforesaid, when administering such oaths to those persons, being an officer and person authorized by law of the said United States to administer the same oaths, and the said oaths being oaths administered in cases where a law of the said United States would then authorize an oath to be administered" (Rec., 3, 4).

Nineteen overt acts are alleged, each being the preparation by the defendant Biggs, at Prineville, on June 30, 1902, of a sworn statement under the timber and stone land act of June 3, 1878, the several statements being alleged as prepared for the respective signatures of nineteen persons named, each of whom is said to be "one of the persons who were to be suborned," etc., "in the manner aforesaid."

Section 5440 of the Revised Statutes is as follows:

> "If two or more persons conspire either to commit an offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than $10,000, and to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

The question of the sufficiency of the indictment was raised by demurrer and by motion in arrest of judgment,

both of which were overruled by the court. The demurrer will be found on pages 13 and 14 of the record, and the motion in arrest of judgment will be found on page 33.

It is submitted that the indictment does not charge a conspiracy to commit any offense against the United States.

The charge is that Williamson, Gesner, and Biggs conspired "to suborn, instigate, and procure a large number of persons, to wit, one hundred persons, to commit the offense of perjury." It will be observed that it is not charged that the defendants conspired to commit perjury themselves, but that they conspired to suborn, instigate, and procure other persons, not parties to the conspiracy, to commit it. It is not alleged or even suggested, that the object of the conspiracy was consummated. The indictment contains no allegation or intimation that any perjury was committed by any person or persons whatsoever.

A conspiracy is always, and necessarily, an agreement between two or more persons to do some act or acts in the future. It is the "corrupt agreeing together of two or more persons *to do,* by concerted action, something unlawful, either as a means or an end" (2 Bishop on Criminal Law, § 171).

A charge that two or more persons conspired "to suborn, instigate, and procure" other persons, not parties to the conspiracy, to commit perjury is equivalent to the charge that they conspired to solicit or to attempt to suborn those persons to commit perjury; for since the conspiracy contemplated the commission of perjury in the future, by other persons who were not parties to the conspiracy, it is manifest that the conspirators could do no more than to solicit or attempt to suborn those persons to commit perjury, and that the conspiracy contemplated nothing more. When the conspiracy was entered into, the conspirators could not have known whether their solicitation would be successful or not. Two persons cannot agree that another shall commit perjury, but they can agree to solicit him to commit it.

The question, then, is, Does an indictment which charges a conspiracy between two or more persons to solicit or attempt to suborn other persons, not parties to the conspiracy, to commit perjury, charge a conspiracy to commit an offense against the United States?

Is it an offense against the United States to solicit or attempt to suborn another person to commit perjury?

It is well settled that the common law is not a source of jurisdiction in the Federal courts, and that therefore an offense, to become the subject of an indictment in the courts of the United States, must be an offense created and defined by an act of Congress.

United States *vs.* Hudson, 7 Cranch, 32.
State *vs.* Wheeling Bridge Co., 13 How., 563.
United States *vs.* Britton, 108 U. S., 193.

It has also been repeatedly held that an indictment under the first clause of section 5440 of the Revised Statutes must, to be valid, allege, as the object of the conspiracy, some offense that is made by statute a crime against the United States.

United States *vs.* Payne *et al.*, 22 Fed., 426.
In re Wolf, 27 Fed., 611.
United States *vs.* Adler, 49 Fed., 736.
United States *vs.* Taffe, 86 Fed., 113.
United States *vs.* Melfi, 118 Fed., 899.
United States *vs.* Britton, 108 U. S., 193.

At common law, subornation of perjury is the "offense of procuring a man to take a false oath, amounting to perjury, who actually takes such oath."

1 Hawkins P. C., Curw. ed., p. 435.
2 Bishop on Criminal Law, § 1197.

By section 5393 of the Revised Statutes it is provided that—

> "Every person who procures another to commit any perjury is guilty of subornation of perjury."

The offense against the United States constituted by this section is identical with the common-law crime of subornation of perjury. It is essential, under this section, as at the common law, that perjury shall in fact have been committed.

United States *vs.* Dennee, 3 Woods, 39.
United States *vs.* Wilcox, 3 Blatchf., 393.
United States *vs.* Evans, 19 Fed., 912.
United States *vs.* Howard, 132 Fed., 325.
United States *vs.* Cobban, 134 Fed., 290.

While, at the common law, subornation of perjury was not committed unless the person suborned actually committed perjury, an unsuccessful incitement or solicitation to commit perjury was punishable as an indictable attempt.

2 Bishop, Criminal Law, § 1192.
Bishop, Dir. and Forms, §§ 966, 967.
2 Wharton on Criminal Law, § 1329.

> "Subornation of perjury, by the common law, seems to be an offense of procuring a man to take a false oath, amounting to perjury, who actually takes such oath. But it seemeth clear that if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury, yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment."
>
> 1 Hawkins P. C., Curw. ed., p. 435.

Unsuccessful solicitation to commit perjury is punishable at common law as an indictable attempt. The incitement to perjury does not render the inciter guilty of subornation of perjury, but does render him guilty of another and a distinct offense. In courts having common-law jurisdiction, therefore, an indictment charging a conspiracy to solicit or to attempt to suborn the commission of perjury would be valid.

But this is not true in the courts of the United States. These courts have no common-law jurisdiction. There are no common-law offenses against the United States, and the statutes will be searched in vain to find any law which makes an attempt to suborn perjury an offense against the United States. No matter how earnest the solicitation, or how strenuous the instigation, unless it is successful the inciter is not guilty of an offense against the United States, and is not punishable in the courts of the United States.

It follows, therefore, that if an actual attempt to suborn the commission of perjury does not constitute an offense against the United States, a conspiracy by two or more persons to solicit or to attempt to suborn other persons to commit perjury is not a conspiracy to commit an offense against the United States, and is not punishable under section 5440 of the Revised Statutes. We submit, therefore, that the indictment does not charge a conspiracy to commit any act made an offense against the United States, and that the demurrer and the motion in arrest of judgment should have been sustained.

From certain averments in the indictment, it may be inferred that the pleader attempted to charge a conspiracy to commit the offense of subornation of perjury. Conspiracy to commit subornation of perjury is a novelty in the criminal law. Cases may be found, under the common law (but not in the courts of the United States), of conspiracies to attempt to suborn perjury and to suppress and fabricate evidence, but it remained for the pleader in this case to attempt to draw an indictment which seeks to charge a conspiracy to commit subornation of perjury. No precedent for it can be found in the books. The reason is plain: A conspiracy to commit subornation of perjury is, in the nature of things, impossible. It would be absurd to say that a person attempted to commit subornation of perjury; it is equally absurd to say that two or more persons conspired to commit

subornation of perjury. Persons may conspire to themselves commit perjury, but they cannot conspire that some other persons shall commit it. They can agree together that they will solicit and attempt to suborn other persons to commit perjury, but they cannot know in advance what the result of their solicitations will be.

A person is not guilty of subornation of perjury unless he has procured another person to swear willfully and corruptly to a fact which that other person knows to be untrue, which the suborner knows to be untrue, and which the suborner knows the witness knows to be untrue.

If a conspiracy to commit subornation of perjury were possible, the conspirators would have to agree that they would, in the future, procure other persons to swear willfully and corruptly to facts which those persons would, *at that future time*, know to be untrue, which the conspirators would, *at that same future time*, know to be untrue, and which the conspirators would, *at that same future time*, know those persons would know to be untrue. Thus to state the propositon is to show its absurdity. To hold such a conspiracy possible is to impute to conspirators knowledge which the court knows they cannot possess. No man can know the future, and the mere allegations of a pleader will not suffice to obviate this natural law.

We submit that it is absolutely and utterly impossible to frame a valid indictment charging a conspiracy to commit subornation of perjury. Indictments charging conspiracies with reference to perjury must allege either that the conspirators conspired to commit it themselves, or that they conspired to attempt to suborn others to commit it. The pleader, by merely inserting in an indictment averments imputing to the conspirators knowledge of matters to occur, if at all, in the future, which they could not possibly possess, and which the court judicially knows they could not possess, cannot turn what is nothing more than an agreement to

solicit the commission of perjury into an agreement to commit subornation of perjury.

The indictment was sustained by the court below as an indictment charging a conspiracy to commit subornation of perjury. We have shown that what the indictment really charges is a conspiracy to solicit and to attempt to suborn other persons to commit perjury, and that a conspiracy to commit subornation of perjury is utterly impossible. We purpose now to analyze and dissect the indictment and to show that even if we admit that a valid indictment may be framed charging a conspiracy to commit subornation of perjury, the indictment in this case is utterly insufficient for the purpose, but is fatally defective. It will be borne in mind that in the discussion of the indictment which follows we are conceding that a conspiracy to commit subornation of perjury may be entered into, for the purpose of argument only, and for the purpose of showing that this indictment is fatally defective even as an indictment attempting to charge a conspiracy to commit subornation of perjury.

(1) General Principles.

An indictment charging a conspiracy to commit subornation of perjury must sufficiently show that the defendants conspired for a purpose which would, if accomplished, amount to the offense of suborning other persons to do something which, if done, would amount to the offense of perjury. The charge includes the fact of conspiring, which, in order to be of criminal complexion, must appear to involve the included offense of intended subornation, and the subornation intended must appear to contemplate the offense of perjury committed by others.

It follows, upon well-settled principles of criminal pleading, that an indictment which undertakes to charge a conspiracy to suborn the commission of perjury must enumerate, allege, and particularize all the acts, facts, and circumstances

which are requisite to constitute the three offenses of conspiracy, subornation of perjury, and perjury.

By this, of course, is not meant that the two included and dependent offenses must be charged as actually committed. Neither is it to be contended that the criminal objects of the conspiracy must be set out more definitely or with greater particularity than the scheme of procurement, as it was formed in the minds of the conspirators, contemplated their accomplishment. All that is maintained is that the frame of the alleged scheme must be so exhibited as to show that it included the intention to do and procure such acts as would, if done and procured, in the manner and under the circumstances intended, amount to subornation of perjury by the conspirators and the commission of perjury by other persons influenced thereto by the conspirators.

Unless the indictment so exhibits the purposes of the alleged conspirators as to demonstrate that the acts intended to be done would constitute the two included offenses, it would be inadequate to fulfill the recognized purposes of every indictment. It would be manifestly insufficient for the grand jury to charge facts going to make a conspiracy, and to aver that the object of the conspirators was to commit subornation of perjury. In such an indictment, the suborning and the perjury to be suborned would be stated as mere abstractions, in respect of which it would be impossible for the defendants intelligently or effectually to prepare their defense; and such a form of charge would be no more than an expression of the grand jury's opinion, understanding, and conclusion as to the legal effect of facts known to them, but not stated, and the court would be unable to see and to say that the supposed purposes of the conspirators, if carried into effect, would amount to the crimes imputed as within the scope of the alleged conspiracy.

An indictment undertaking to charge any offense which is criminal by reason of some other offense committed or intended to be committed must set forth, allege, and indi-

vidualize all the acts, facts, and circumstances necessary to make up both the principal and the included offense. Since the criminal complexion of the principal fact alleged depends upon the criminality of the subordinate matters embraced therein or connected therewith, these subordinate matters must be presented with such an analysis of their composition as shall demonstrate their character as offenses. Otherwise a part, at least, of the charge would be a merely general and abstract allegation of crime, without the requisite enumeration and individualizing of the elements.

Thus, an indictment for burglary must not only charge a breaking and entering and the intent to commit a felony, but must specify the felony intended to be committed and set out the essential elements of the felony in accordance with the legal definitions thereof.

Upon the same principle, all courts agree that, on a charge of subornation of perjury, the indictment must set out, not only all the facts requisite to constitute the suborning, but as well those facts which are essential to make the suborned testimony amount to perjury.

U. S. *vs.* Dennee, 3 Woods, 41.
U. S. *vs.* Evans, 19 Fed., 912.
Com. *vs.* Douglass, 5 Metc., 244.
People *vs.* Ross, 103 Cal., 425.

An indictment charging that the defendants did procure and suborn B. and T. to swear falsely, etc., was held bad because it failed to aver that B. and T. "did knowingly and willfully swear falsely."

U. S. *vs.* Wilcox, 4 Blatchf., 393.

> "To make a good indictment for subornation of perjury, the false swearing must be set out with the same detail as on an indictment for perjury, and the indictment must charge that the defendants procured the witness to testify knowing that the testimony would be false, and knowing that the witness knew that the testimony he had given, or was about

to give, was false, and knowing that he would corruptly and willfully give false testimony."
U. S. *vs.* Dennee, 3 Woods, 41.

So where the charge is conspiracy to commit an offense, the indictment must not only aver the fact of conspiring on the part of the defendants, but set out the things intended to be done in such way as to show that the alleged purpose, if effected, would amount to the offense specified. And the courts will, on demurrer or motion in arrest of judgment, analyze the scheme imputed to the defendants, as exhibited in the indictment, to determine whether the acts alleged as intended constitute an offense.

An indictment charging that the defendants conspired to commit a burglary by breaking and entering a house with intent "to steal, take and carry away" certain goods therein being was held bad because it omitted the word "*feloniously*" in the statement of the larcenous intent.

Scudder *vs.* State, 62 Ind., 13.
Smith *vs.* State, 93 Ind., 67.

And a statute undertaking to authorize an indictment in such a case to charge merely the fact of conspiring to commit an offense, without setting out the elements of the intended offense, was held to be violative of constitutional guaranties respecting the rights of persons accused of crime.

Landringham *vs.* State, 49 Ind., 186.
State *vs.* McKinstrey, 50 Ind., 465.

An indictment charging conspiracy to obtain goods by "divers false pretenses" is insufficient, unless the false pretenses are stated and the acts intended to be done are set out.

State *vs.* Keach, 40 Vt., 113.
State *vs.* Roberts, 34 Me., 320.
Com. *vs.* Prius, 9 Gray, 127.

"Where the conspiracy has been to do an act prohibited by statute, the object which makes it unlawful can be described only by its particular features; and without doing so it cannot be shown that the confederates had an unlawful purpose."

Gibson, Ch. J., in Hartmann *vs.* Com., 5 Pa., St., 66.

"When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment."

Shaw, Ch. J., in Com. *v.* Hunt, 4 Mete., 126.

"It is not enough that it [the indictment] contains a sufficient description of the crime attempted to be charged, but it should also contain a statement of the facts necessary to constitute the offense. The proof of such facts, when not properly averred, cannot aid the indictment after verdict."

State *vs.* Hewett, 31 Me., 399.

Where the object of the alleged conspiracy is to do an act which is made criminal by statute, such purpose must be set out with so much detail as will bring it within the statutory description of the offense.

Com. *vs.* Eastman, 1 Cush., 189.

If the purpose, as stated, is to do acts which fall short of an offense, the indictment is bad after verdict.

Rex *vs.* Turner, 13 East, 228.

State *vs.* Rickey, 9 N. J. L., 293.

An indictment for a conspiracy to procure the commission of an offense against the United States must set out all the constitutent ingredients of the intended offense, with such averments of facts and circumstances as will show that the acts charged as intended to be procured would, if done,

amount to the offense alleged to be the object of the conspiracy.

U. S. *vs.* Melfi, 118 Fed., 899.
U. S. *vs.* Taffe, 86 Fed., 113.
U. S. *vs.* Howard, 132 Fed., 325.
U. S. *vs.* Milner, 36 Fed., 890.
U. S. *vs.* Watson, 17 Fed., 145.
In re Wolf, 27 Fed., 606.
U. S. *vs.* Peuschel, 116 Fed., 642.

Under a statute making it an offense willfully to misapply the funds of a bank, an indictment was held insufficient which charged only that the defendant "willfully misapplied" certain of such funds, the court saying: "There must be averments to show how the application was made, and that it was an unlawful one."

U. S. *vs.* Britton, 107 U. S., 699.

And upon another indictment under the same statute, against the same party and another, charging conspiracy between them willfully to misapply the bank's money, the acts charged as intended to be done were examined and held not to amount to willful misapplication, whereupon the indictment was pronounced bad.

U. S. *vs.* Britton, 108 U. S., 199.

The facts supposed to constitute conspiracy must be sufficiently set out in the indictment, no resort being had to the averments of overt acts to supplement the allegations of the indictment.

U. S. *vs.* Britton, 108 U. S., 205.

So an indictment for conspiracy to obstruct the administration of justice in a court of the United States must set out all the facts necessary to constitute such an obstruction of justice in the particular court named, and must in addition aver that the defendants knew that justice was being ad-

ministered in that court, and knew all other facts requisite to make them aware that the acts done by them would constitute an obstructing of justice.

Pettibone *vs.* U. S., 148 U. S., 197.

In United States *vs.* Cruikshank, 92 U. S., 542, the indictment, following closely the words of the statute upon which it was predicated, charged that the defendants conspired to hinder and prevent certain other persons in the free exercise and enjoyment of the rights, privileges, immunities and protection granted them as citizens of the United States. After verdict of guilty, the indictment was held bad and judgment was arrested on the ground that there was no specific statement or particularization of the rights, privileges, etc., indicated in the text. The general principle governing this phase of criminal pleading is thus stated:

> "In criminal cases prosecuted under the laws of the United States the accused has the constitutional right to be informed of the nature and cause of the accusation. In United States *vs.* Mills, 7 Pet., 142, this was construed to mean that the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged; and in United States *vs.* Cook, 17 Wall., 174, that every ingredient of which the offense is composed must be accurately and clearly alleged.
>
> "It is an elementary principle of criminal pleading that where the definition of an offense, whether at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars (1 Archbold Cr. Pr. and Pl., 291)."

United States *vs.* Hess, 124 U. S., 483, was an indictment upon section 5480 of the Revised Statutes for using the mails in the execution of a scheme intended to defraud. The averment was that the defendant, "having devised a scheme to

defraud divers other persons," received a letter in execution of that scheme, there being no statement as to the nature or incidents of the scheme whereby its fraudulent character was shown or whereby it could be identified. Although the indictment followed closely the words of the statute, it was held bad after verdict of guilty, because it failed to set out the elements of the fraudulent scheme, which were considered constituents of the crime. Mr. Justice Field said:

> "The general, and, with few exceptions, of which the present case is not one, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially or by way of recital.
>
> "The statute is directed against devising or intending to devise any scheme or artifice to defraud to be effected by a communication through the post-office. As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial.
>
> "The averment here is, that the defendant, having devised a scheme to defraud divers persons to the grand jurors unknown, intended to effect the same by inciting such other persons to communicate with him through the post-office, and received a letter on the subject. Assuming that this averment of having devised the scheme may be taken as sufficiently direct and positive, the absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny, without stating the property stolen, or its owner, or the party from whose possession it was taken."

Of an indictment charging that the defendants conspired to defraud two persons, who were named, "and divers other persons, by removing and secreting divers goods and merchandises, then and there belonging to the said firm, of great value, to wit, of the value of $5,000, the description, quantity and quality of the said goods and merchandises being as yet unknown to the said inquest," it was said by Gibson, C. J.:

> "The counts before us are so uncertain and bald in their circumstances as to shed scarcely a ray of light on the charge which the defendants were required to meet. Take the first of them as a sample of all the rest. It charges that they conspired to defraud their creditors (the prosecutors and divers other persons) by removing and secreting divers goods and merchandises of the value of $5,000—neither time, place nor circumstances is given, and the goods are not attempted to be described by the place where they were kept or by the person who had them in custody. They may even not have been in the State; and a conspiracy to secrete them abroad, having for its object no infraction of our laws, would not be criminal at home.
>
> "It is not averred even that the defendants had any merchandise at all, here or elsewhere; and unless they had it, a conspiracy to conceal it would have been a conspiracy to do what was impossible. It might be inferred, from the motive imputed, that they had it; but Hawkins says that in an indictment nothing material shall be taken by intendment or implication."
>
> Hartmann *vs.* Com., 5 Pa. St., 60.

Examined with reference to the foregoing principles, the indictment in this case will be found fatally defective by reason of its omission to set out at least ten of the elements requisite to constitute the two offenses of subornation of perjury and perjury.

The statute upon which the indictment is obviously drawn, and the only statute to which the language used admits of its being referred, is section 5392 of the Revised Statutes. This section defines perjury as follows:

> "Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

Among the elements, therefore, essential to constitute the offense of perjury, and which must, upon the principles hereinabove stated, be directly averred, set out and particularized in a valid indictment for that offense, are:

(1) The administration of an oath of the tenor prescribed in the statute.

(2) A competent tribunal, officer, or person; that is to say, one that is acting at such time and place and under such other circumstances as render him competent to administer a valid oath;

(3) A proceeding in which some law of the United States authorizes an oath to be administered;

(4) The giving by the offender of oral testimony, or his subscribing of something written in the nature of testimony;

(5) Willfulness in the giving of false testimony;

(6) Want of belief on the part of the witness that his statements are true;

(7) The fact that the statements are made "contrary to his oath;"

(8) To which must be added, upon settled principles of construction, the implied element of falsehood in the statements to be made.

An indictment charging subornation of perjury must show the procurement of an offense in which all of the foregoing

elements are included, and must, in addition, aver, in respect of the alleged suborner—

(9) That he knew that the testimony procured to be given was false; and,

(10) That he knew that the person suborned did not believe the statements made by him to be true.

An indictment charging conspiracy to commit subornation of perjury must show the fact of conspiring, and so state the purpose as to show that the conspirators intended and contemplated, as incidents and results of their scheme, all the facts requisite to constitute subornation on their own part and the commission of perjury on the part of those suborned. This indictment fails to state sufficiently any of the foregoing enumerated elements of the two offenses necessary to be stated, and in respect of some of them there is no attempt at all to state them.

In its more strictly technical features, such as the necessary averments of time and place, and in particularity, certainty, and directness, it is fatally defective.

In the argument which follows, the foregoing features of the indictment are considered, not in the order in which they have been stated, but with regard rather to convenient arrangement, and according to this scheme:

First. Technical Insufficiencies.

Second. Substantial Omissions.

(2) Technical Insufficiencies.

(1) *Averments of Time and Place.*

The indictment is fatally defective, as will appear upon slight examination, for want of all proper averments of time and place.

Only one date and only one place are laid at any point of the indictment. It is alleged at the outset that the persons named as defendants entered into the supposed conspiracy on June 30, 1902, at Prineville, in the District of Oregon,

and this is the only time and this is the only place of which any mention is made and to which any of the subsequent allegations can be referred.

For the suborning no time or place at all is alleged. It does not appear by any affirmative averment that this act was to be committed at a date subsequent to the conspiring, or within the jurisdiction of the court, or even within the limits of the United States.

It is said to have been the purpose to procure the perjury to be committed "in the said district," but in the enumeration of the acts alleged as constituting the offense no place is laid except in respect of the commissioner's official character, and for these several acts no date is assigned, except so far as half a dozen casual and sporadic adverbs of time indicate that the whole perjury was intended to coincide precisely with the act of conspiring which looked forward to the procurement of the perjury.

In only one instance, after the original designation of date and place, are time and venue laid together; that is in the averment that Biggs "was then and there a United States commissioner."

After that point, there is no specification whatever of locality for any of the facts stated, and only at four points is there any pretense of indicating a time.

With these exceptions, all the elements of the two offenses attempted to be charged, so far as such elements are set forth at all, are laid without reference to date or venue.

The elementary rule is, of course, that in an indictment a time and a locality must be assigned for every traversable fact which is averred. Every act which constitutes an element of the offense charged must be laid as occurring upon some date and at some place; and if the indictment fails thus to lay time and venue for every material allegation of fact, it is bad upon general demurrer and also upon motion in arrest of judgment.

> "Time, as well as place, ought, in general, not merely to be mentioned at the beginning of an in-

dictment, but to be repeated to every issuable and triable fact; for wherever a venue is necessary, time should be united with it."

1 Chitty, Crim. Law, 219.
1 Bishop, Crim. Proc., § 408.

"In an indictment for robbery these words [then and there] must be connected with the stroke or robbery, and not merely with the assault; and in a case of murder it is not sufficient to allege that the defendant on a certain day made an assault and struck the party killed, but the words 'then and there' must be introduced before the averment of the stroke."

2 Hale, Pleas of the Crown, 178.
2 Hawkins, Pleas of the Crown, § 88.
Wingfield's Case, Cro. Eliz., 739.
Rex *vs.* Morris, 2 Strange, 901.
1 Chitty, Crim. Law, 219.
1 Bishop, Crim. Proc., § 408.

"Where time is necessary to be stated, it must be laid with a venue; and wherever a venue is necessary, time must also be mentioned."

1 Chitty, Crim. Law, 218.
Rex *vs.* Holland, 5 Term. Rep., 607, 620.

The insufficiency of an indictment in respect of proper averments of time and place may be availed of on general demurrer.

Rex *vs.* Holland, *supra.*

And also on motion in arrest of judgment after verdict of guilty.

Ball *vs.* U. S., 140 U. S., 118.

(*a*) *Time.*

The word "then" occurs seven times in the whole course of the indictment.

In one instance it is used in connection with the altogether immaterial and irrelevant averment that Williamson and

Gesner were "then and before then engaged in the business of sheep raising."

The remaining five averments qualified by this adverb are:

That Biggs was "then and there a United States commissioner;"

That the persons to be suborned "would then be applying to enter" the lands referred to;

That these persons "would then well know" that their statements were untrue;

That the defendants "would then well know" that those statements were untrue;

That the oaths would be taken "in cases where a law of the said United States would then authorize an oath to be administered."

(1) Disregarding the wholly immaterial mention of the partnership between two of the defendants, there are only five of the elements of these two highly complex offenses which are laid with any attempt at definiteness in respect of time, and only one assigned with any regard at all to locality. For all the other material and traversable averments requisite to complete a charge of these crimes, neither date nor venue is laid. It does not appear that on any day or at any place the subornation was to be done or attempted, or that the declarations and depositions were to be sworn to, or that the lands were to be of the character mentioned, or that the matters to be sworn to were to be material, or that the officer was to be competent, or that a case was to be pending or to be in contemplation, or that any one of various other things was to exist or to be done.

All these facts are evidently regarded by the pleader as necessary to be stated, and as material, issuable and triable averments. Yet all of them are laid in utter disregard of the elementary rule on the subject, and without any reference at all to date or venue.

It is no doubt true that the scheme of a conspiracy need not be set out with any more certainty and precision than

that scheme existed, or can be proved to have existed, in the minds of the conspirators. But in a case of this kind, the supposed conspiracy, however indefinite in its scope and details, must have contemplated some general time and place for its accomplishment. Indeed, unless the alleged suborning and perjury intended were to occur at some time in the limited future and to be committed in some certain locality, they would be utterly ineffective, and the scheme would not be criminal.

Unless the alleged conspirators contemplated that the supposed false swearing should take place before Biggs while he continued to be a commissioner, that is to say within the limits of his lifetime and the duration of his commission, they could not be said to have intended that perjury should be committed; and unless the false swearing alleged to have been intended was planned to be committed within the territorial limits of the officer's authority, it would have been altogether nugatory and not an offense against the United States.

Again, in the nature of the case the proposed suborning of the applicants and their commission of perjury must have been contemplated as to occur at some date, perhaps indefinite, but at any rate subsequent to the act of conspiring; and to this date the averments intended to set out the elements of the two offenses should have been referred. If that date was too indefinite to be approximately fixed, still it might have been laid as in the future with reference to the date of the conspiracy; and the subsequent averments of facts constituting subornation and perjury might have been referred to the time thus indicated.

As the indictment stands, it is fatally defective by reason of the mere omission to aver time and place, and for that reason alone it is insufficient to support a conviction.

(2) More than this, the pleading is rendered repugnant and insensible by such adverbs of time and place as are employed.

Only one date and only one place being laid anywhere in the indictment, every subsequent adverb of time and place must relate to the date and venue first stated, and fix every fact which is stated as of any time and place at all as occurring on the day and at the place to which they refer; that is to say, on June 30, 1902, and at Prineville. Such is the necessary effect of the rule of construction obtaining in such cases.

A relative pronoun or other relative word must be referred to the antecedent standing nearest to it. "Else," said Jeffreys, J., "Dr. Busby, that so long ruled in Westminster School, taught me quite wrong."

Rosewell's Case, 10 How. St. Tr., 147, 299.
1 Chitty, Crim. Law, 173.

Denison *vs.* Richardson, 14 East, 291, was covenant on a bond of indemnity, in which defendant was obligor, whereby the Bank of England was secured against loss on account of discounting the bills of L. & B. The declaration, after reciting that the bills were dated and discounted on August 28, 1810, averred that, before the same became due, L. & B. became insolvent and unable to pay them, whereby the plaintiffs became liable therefor, and "did then and there necessarily pay" the bank £100,000 on account thereof. It was held that the phrase "then and there" related to the only antecedent date mentioned, the date of the giving of the bills, and the declaration was therefore repugnant and insensible. Said Lord Ellenborough:

> "The plaintiffs cannot support their allegation that by reason of the premises they were forced and obliged to pay, and did then and there necessarily pay the bank their advance on the bills, when it appears by reference to the only antecedent of time mentioned that this was on the very day of the advance on the bills, and that the plaintiffs must have paid it voluntarily. I was considering whether the words 'did then and there necessarily pay' might not be re-

> ferred to the time and place when and where the plaintiffs were forced and obliged to pay the money; but still there would want an allegation of time and place when and where they were forced and obliged to pay.
>
> "All this waste of paper, time and expense might have been saved by the addition of a few words as to time and place."

Indeed, in criminal pleading this rule of construction extends still further, and is so stringently applied that a fact alleged with a "then and there" is given absolute identity in point of time and place with the fact laid under the time and place to which the adverbial phrase relates. The settled distinction is that a fact laid as of the day first named in the indictment may be understood to have occurred at any hour of that day, whereas a fact referred by "then and there" to the day first named must be regarded as occurring at precisely the same time with or in immediate sequence to the fact alleged as of the former date.

> "Sometimes 'then and there' must be used instead of repeating the time and place in full; as if the offense consisted of a series of connected acts, such as an assault attended by a spoiling of the clothes, the repetition of the day and the place is insufficient, because it does not appear that the acts were not on different hours of the day; but the words 'then and there' fix them to have been effected together."
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> 1 Bishop, Crim. Proc., § 412.
> 1 Chitty, Crim. Law, 221.
> Rex *vs.* Williams, 1 Leach, 529.
> Rex *vs.* Frances, 2 Comyns, 478.
> Edwards *vs.* Com. 19 Pick., 124.
> Com. *vs.* Butterick, 100 Mass., 12.

Rex *vs.* Williams, *supra,* was an information under a statute making it an offense to assault a person and damage his clothing. The assault was laid on January 18, 1790, and the tearing of the clothes "on the said 18th day of January."

After conviction the information was held bad because the tearing of the clothes was not laid so as to appear to have been simultaneous with or immediately successive to the assault; and it was said that for that purpose "then and there" should have been used.

Edwards *vs.* Commonwealth, *supra*, was another case in which the statute made it necessary, in order to constitute the offense, that several elements should exist at the same moment of time, and the indictment was held bad because it repeated the date instead of using "then and there," and it was said by Shaw, C. J.:

> "The words, 'then and there' are relatives, and refer to some foregone averment, and their effect must be determined by the allegation to which they refer. If that is a single act done, and it is then averred that 'then and there' another fact occurred, it necessarily imports that the two were precisely coexistent and the word then refers to a precise time."

The effect of this principle, as applied to the present indictment, is that all the facts laid with any regard to time are alleged as precisely simultaneous. In other words, the conspiracy, the suborning, and the commission of the several perjuries all were intended to occur at the same time, as a single and continuous transaction.

This is, of course, to charge an impossibility. Every conspiracy is necessarily prospective in its nature and purposes. This supposed conspiracy, as it is outlined in the indictment, the adverbs of time being suppressed, not only contemplated the future, but if the vagueness of the pleading be accorded its presumptive effect, the indefinite and somewhat remote future. The plan was so far unsettled that the persons to be suborned had not been fixed upon; otherwise the grand jury would have named those persons, or at least professed ignorance of their names. Moreover, all the averments as to facts constituting the subornation and the commission of perjury are expressed in phrases importing futurity; the per-

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sons to be suborned were to swear that they "would declare and depose" matters "which they should not believe to be true," in a proceeding in which they "would then be applying to enter" the lands, and "would then well know" their statements to be untrue, because they "would have made agreements and contracts" which falsified those statements.

The effect of such adverbs of time and place as are used is to fix all these facts, which are, in their nature and in the form of the pleader's expression, necessarily separate and successive in time, as occurring at precisely the same moment, that moment being the moment at which the conspiracy was formed from which, and after which, these facts were to result. To lay all these acts and facts as absolutely simultaneous is to allege a thing impossible and absurd, and this form of averment renders the whole indictment repugnant and insensible.

(3) Still further, by this inconsistent laying of time and venue the perjury which is alleged as intended to be procured is shown to be an impossibility in law.

The only date and locality assigned for the taking of the false oaths is such as may be inferred from the averment that the suborned persons were to appear and be sworn before Biggs "who was then and there a United States commissioner;" that is to say, the supposed perjury was to be committed on June 30, 1902, and at Prineville; but at the same time those persons "would then be applying to enter and purchase" certain lands in Crook County. In other words, the false swearing was to be done in the course of an application to enter public lands in Crook County, and before a commissioner at Prineville.

The court knows judicially that Prineville is in Crook County, that there is no land office in Crook County, and that lands in that county can be entered only by applications made at The Dalles, which is about 100 miles from Prineville. The effect of these averments is that the suborned

persons would be swearing to certain statements at Prineville, where no applications could be made, and at the same moment applying to enter certain lands at The Dalles. Such combined acts are physically and legally impossible. There could be no applications to enter the lands mentioned until the application papers were filed at the proper office. These suborned persons could not be applying to enter lands at The Dalles while they were before the commissioner at Prineville; nor could they be engaged anywhere in applying for public lands while they were swearing to their incomplete application papers. At the stage of the proceeding at which the proposed perjury was to be committed, there could be no applications in existence, because there can be no application until the application papers have been sworn to, and the suborned persons could not be applying at the moment of swearing to their papers, because the execution of the papers necessarily precedes the act of applying to enter.

(4) A further repugnant element is introduced into the indictment by the use of the word "being" in the averments immediately preceding the statement of the overt acts.

These averments charge the materiality of the matters to be sworn to, the official character of the United States commissioner, and the fact that the oaths were authorized by the laws of the United States to be administered in the cases referred to. And all these averments are made by the use of the participle "being," without any limitation of time or place.

This participle, thus unqualified, is always and necessarily understood as relating to the date of bringing the indictment, and never to any time indicated in that document. In other words, if the pleader uses no adverb of time the court will limit the participle by the word "now."

> "The word 'being' will, unless necessarily connected with some other matter, relate to the time of the indictment rather than of the offense; and there-

fore an indictment for a forcible entry on land, *being* the prosecutor's freehold, without saying *then being,* was held insufficient."

1 Chitty, Crim. Law, 220.
Bacon Abridg., Indictment, G. 1.
Comyn's Digest, Indictment, G. 2.
Rex *vs.* Ward, 2 Ld. Raymond, 1461, 1468.
Bridge's Case, Cro.'s Jac., 639.

These three averments are, by the terms of the statutory definition, made essential elements of the perjury necessary to be set out. They are laid without any venue at all, and the use of the word "being" fixes the occurrence of the facts intended to be alleged as of the date of the indictment, which was February 11, 1905. In other words, three matters which must have existed at the time of the false swearing in June, 1902, are charged to have existed for the first time nearly three years later, and at a time when, in the nature of the case as stated, the alleged conspiracy and its intended results were things of the remote past.

(*b*) *Place.*

With respect to venue, the indictment is, as has been pointed out, even more defective than with respect to its allegations of time.

Only one place, Prineville, is mentioned, and that is stated as the *locus* of the deliberations had by the conspirators.

(1) Only one other fact is, by any attempted averment of place, referred to any locality whatever: It is said that Biggs, the officer before whom the contemplated perjury was to be committed, was "then and there a United States commissioner for the said District of Oregon." This combined averment of time and place fixes the position of Biggs at the time before mentioned, which was the moment at which the alleged unlawful agreement was reached in the minds of the conspirators.

Every other element of both of the crimes necessary to be set out is left without any pretense of local quality, and the whole of both offenses is absolutely in the air.

Merely as matter of technical sufficiency, these omissions of venue are fatal to the indictment. The document displays an amazing disregard of the elementary rules of criminal pleading; and it is submitted, upon the authorities already mentioned, that it must be pronounced inadequate to support a conviction.

(2) With respect to some of these elementary facts, the omission is much more than a technical defect, and it robs the averments of all materiality and substantial significance.

The alleged fact that the suborned persons "would then be applying to enter" certain public lands is of no possible relevancy without some local suggestion to show that the supposed applications were made, or to be made, at some land office which is shown by appropriate averments to have jurisdiction over the lands in question. Had the phrase been "then and there," it might, by reference to the previous mention of Prineville and Crook County, and aided by judicial knowledge of geography and the boundaries of The Dalles land district, have sufficiently imported applications occurring at Prineville for lands in Crook County, and therefore properly sworn to before a commissioner in that county. Even that would have drawn heavily upon the judicial indulgence. But here, in fact, there is not even a shadowy allusion to the *locus* of the alleged applications, by which the averment can be fixed to any, even apparently, valid proceeding.

So of the concluding averments of the indictment proper, those immediately preceding the mention of overt acts, and undertaking to set forth the indispensable elements of materiality, the authority of the officer in administering the oaths, and the character of the proceedings as those in which such oaths were authorized by law to be administered. If these facts existed, they must have existed at some time and

some place; and unless they existed at certain times and places they could not go to constitute perjury or any other offense. The time of each averment is fixed by the word "being," which we have seen can operate only to express the date of the indictment. Of the place of these facts, there is no suggestion whatever. Unless the matters to be sworn to were to be material at the place of the proposed false swearing; unless the officer was to be one clothed at the place of his acting with authority to administer oaths, and unless the proceeding was, at the place of its occurrence, of the character contemplated by the statute, the facts attempted to be thus stated are utterly irrelevant.

Because no venue is laid for half a dozen or more of the constituent elements of the offense charged, the indictment is, we submit, insufficient to sustain a conviction.

(2) *Indefiniteness as to Names.*

The names of the persons to be suborned are not stated. The averment is that defendants conspired to procure "a large number of persons, to wit, one hundred persons, to commit the offense of perjury, by, etc." The persons thus vaguely indicated are thereafter specified only as "the said persons" or as "those persons."

No averment is made in excuse or explanation of the omission to indicate the persons intended to be suborned; it is not said that their names were to the grand jurors unknown, or that no particular persons were had in mind by the conspirators.

The names of the persons proposed to be suborned are clearly material on a charge of subornation; and, on general principles of criminal pleading, they should be stated in an indictment for conspiracy to commit that offense, or some reason should be given for omitting them.

It is, of course, understood that a charge of conspiracy need not state the purpose or scheme of the conspiracy any

more precisely or definitely than it existed in the minds of the conspirators. A conspiracy may be formed to commit a certain offense at such time and place, and under such circumstances, as may afterwards be settled upon or may prove to be convenient. In such a case, the offense is complete on the consummation of the agreement, although the details of its execution are left to be determined by further consideration or opportune circumstances. And doubtless such an unlawful agreement need not be stated in any more definite form than that in which it is shaped by the conspirators themselves.

Dealy *vs.* United States, 152 U. S., 539, was such a case, the charge being that of conspiracy to defraud the United States of large tracts of public land, in a certain county of a certain State, "by means of false, feigned, illegal and fictitious entries under the homestead laws of the United States." To the objection, that the indictment was not sufficiently specific in respect to the lands intended to be obtained, the court said:

> "But manifestly the description in the indictment does not need to be any more definite and precise than the proof of the crime. In other words, if certain facts make out the crime, it is sufficient to charge those facts, and it is obviously unnecessary to state that which is not essential. Can it be doubted that if these defendants entered into a conspiracy to defraud the United States of public lands, subject to homestead entry, at the given office in the named county, the crime of conspiracy was complete, even if no particular tract or tracts were selected by the conspirators? It is enough that their purpose and their conspiracy had in view the acquiring of some of those lands, and it is not essential to the crime that in the minds of the conspirators the precise lands had already been identified."

In this indictment, however, the indefinite statement regarding the persons to be suborned occurs under substantially different circumstances from those which in the Dealy Case

were held to justify an indeterminate allegation in respect of the lands intended to be obtained.

In the Dealy Case there was a fairly definite statement as to the lands, it being said that they were public lands of the United States lying in a certain county and subject to entry at a specified land office. This was a pretty narrow limitation upon the generality of the reference, and indicated with a fair degree of approximation what lands were intended. But in the present indictment there is no attempt whatever at limitation or approximation, and the generality of the averment may include every human being on the face of the globe.

In the Dealy Case, again, the lands intended to be acquired constituted no element of the offense and were not material to be stated. It was charged that the defendants conspired "to defraud the United States," which was sufficient, of itself, to state a complete offense under section 5440 of the Revised Statutes. The further mention of the lands and of the fraudulent entries was but a designation of the means by which the criminal purpose, already fully set forth in the statutory words, was to be effected. The general rule is, that the means of committing crime need not be specified; so that vagueness in this respect was immaterial.

Here, on the other hand, the charge is conspiracy to commit an offense against the United States, a charge which cannot, like that of an intent to defraud the United States, be stated in the words of the statute. Nor could it be stated even by charging conspiracy to commit a specific offense by name. It would be palpably insufficient, as the pleader seems to have been conscious, to allege that the defendants conspired to commit subornation of perjury. The charge is not complete until all the elements of the offense are set out, and particular acts composing it are individualized, so that the purpose of the conspiracy may be seen to be an offense, and may be identified as a specific criminal act.

In the offense of subornation of perjury, the persons suborned cannot be considered the mere means of effecting

the criminal purpose. On the contrary, they are part and parcel of the offense, being essential elements of its substance. It would be as proper to call the house which is broken and entered the means of a burglary, or the person killed the means by which a murder is effected, as to say that the persons who are suborned are the means and incidents of the subornation. Their names are as material to any proper and sufficient statement of the charge as any other fact going to constitute the offense. Hence these persons cannot be indefinitely indicated; but, as is the rule respecting all other material facts, their names must be given, or else some reason stated to explain the omission.

Very possibly a conspiracy might be formed for the purpose of suborning any or all persons who may prove to be open to subornation, and the conspirators have no particular persons in mind as the subjects of their enterprise. More probably there might be a conspiracy to suborn certain persons, whose names the grand jury would be unable to learn. But neither of such cases would justify the grand jury in describing the persons to be suborned as "a large number of persons," and wholly omitting to account for the failure to mention their names. In the former case the conspiracy should be stated as it is found to exist, with an averment to show that the persons to be suborned had not been determined upon by the conspirators. In the latter case, it should appear that the names were to the grand jurors unknown.

But no degree of uncertainty, whether in the minds of the conspirators or of the grand jurors, would warrant so indefinite an averment as we have here in respect of so material an element of the offense.

In an indictment for conspiracy to extort money, the name of the person from whom the money was to be extorted must be stated.

Com. *vs.* Andrews, 132 Mass., 263.

Upon a charge of conspiracy to procure the insertion of fictitious names in the census list, some at least of the fictitious names should be stated.

U. S. *vs.* Stevens, 44 Fed., 132.

An indictment charging conspiracy to defraud two persons named, "and divers other persons," is severely criticized on this account, and on this and other accounts held bad, by Gibson, C. J., in Hartmann *vs.* Commonwealth, 5 Pa. St., 66.

In the present instance it is quite clear that the purpose of the alleged conspiracy, as the grand jury understood it, was not a general and indefinite subornation of such persons as might be found susceptible of corruption, but of certain particular persons, and that the grand jury knew the names of some, if not all, of such persons. The averment that there were one hundred persons who were to be the subjects of subornation is utterly inconsistent with the notion that the conspirators had no particular persons in mind. If the unlawful scheme had so far taken form in the minds of the conspirators as that a certain number of subornations had been fixed upon, and if this number was so definitely determined that evidence of it could be given to the grand jury, it is impossible that some at least of these hundred persons had not been selected. Although the grand jurors may have been unable to discover who these persons were, yet when the evidence disclosed that the form of the conspiracy had developed to such degree of precision as the fixing of this number implies, there was no excuse for stating the conspiracy as altogether in the air.

It is also clear that the grand jury did know the names of some, at least, of the persons who were supposed to be intended to be suborned. It is apparent that this indictment was not based upon any direct evidence of the fact of conspiring, but upon inference from the acts subsequently done and supposed to point backward to an original concerted

purpose. Such, at least, was the theory upon which the case was tried, there being no attempt to prove any actual agreement independently of the facts offered as indicative of some such agreement. It is scarcely possible that the grand jury should have obtained evidence of the alleged suborning of divers persons, from which a prior agreement was inferred, without learning the names of a few of the persons who were intended to be suborned. Of the witnesses who were produced by the Government at the trial to prove the alleged subornation, at least six had testified before the grand jury, as appears from the back of the indictment; and it cannot be supposed that these witnesses failed to supply sufficient data to warrant the grand jury in naming a part of the hundred persons included in the plan of the conspiracy.

> "It may be said that the form of a criminal purpose, meditated but not put in act, can seldom be described, but it can be as readily laid as proved."
> Hartmann *vs.* Com. 5 Pa. St.; 66.

That this vagueness in the charge was in its nature prejudicial to the defendants, and that it presumably did in fact prejudice them, is also clear. Let it be supposed, as appears from the record to have been the fact, that the defendants had been engaged in transactions or negotiations with a number of persons, looking to an acquisition by the defendants or some of them of lands, through entries by the other persons under the timber and stone land act. Let it be further supposed, as may easily be the case in such a matter, that some of these transactions bore a doubtful aspect, and though in fact innocent and readily explainable, might have been regarded with suspicion and have been, by a hasty or uncharitable district attorney, considered proper subjects of such an indictment as the present. The defendants are not at all apprised as to what cases are had in mind by the grand jury and intended to be adduced at the trial in the support of the charge; and if their transactions have been numerous,

say as many as a hundred, they must be quite at sea in the preparation of their defense. They select such instances as seem to them of most ambiguous complexion, their transactions with A, B, and C, and come to trial prepared to explain them. Then they find that what the grand jury and the district attorney have in mind are the negotiations with X, Y, and Z, which are equally innocent and explainable, but for which no preparation has been made.

Still further, the indefiniteness of the indictment in this regard leaves the defendants without any advantage from the record upon a subsequent indictment or trial for the same offense. If this judgment should be reversed and the cause remanded for a new trial upon the same indictment, how is it to be known what sort of a case the defendants are to meet? Of the alleged number of one hundred persons within the scope of the supposed conspiracy, perhaps fifteen or twenty have been produced as witnesses in support of the charge. If defendants prepare themselves to explain these cases at another trial, it may be that, of the remaining eighty or eighty-five cases hinted at in the indictment, fifteen or twenty other cases may be selected to prove the charge, which cases defendants can not possibly anticipate, not knowing the names of the persons held in reserve.

Of an indictment charging conspiracy "to cheat and defraud" a certain company, "and divers others unknown," the Court of Errors of New York, holding the indictment bad, said:

> "Perhaps a stronger reason than any other arises from a consideration of the great injustice which may be perpetrated by means of such indictments. What kind of notice does the defendant receive of the charge against him, by reading an indictment that says he conspired by indirect and unlawful means to defraud some unknown persons? For it can not be denied that under this indictment the defendants might have been convicted of a conspiracy to defraud a man in Kamschatka. How are they to prepare for

their defense? Would not a copy of the Decalogue be as useful to point out the particular offense for which they are to be tried? It would be in vain that they should ransack their memories; for an innocent man would be the least likely to suspect the transaction in which he is to be implicated.

"Such a practice violates the fundamental principle of our criminal law, that no man shall be tried twice for the same offense. That principle has no value unless the accused is apprised of the charge against him, that he may show a former acquittal. Let us suppose a defendant going to trial on such an indictment as the present. He has already been tried for conspiracy and acquitted. Until the moment arrives when the public prosecutor opens his testimony on the trial, the defendant has no means of knowing for what he is to be tried.

"Such indictments as that now under consideration are, in my judgment, directly hostile to these great features of our criminal law. They open the way to general and indefinite charges; they surprise the defendant; they afford no means of determining whether they have been legally found; they deprive the accused of the right of reviewing them; and they leave him at the mercy of the public prosecutor.

"If there were fifty precedents in England, instead of one solitary case against nineteen, and that not applicable, I should be prepared to say that the spirit of our institutions is directly at variance with such indictments."

Lambert *vs.* People, 9 Cowen, 592.

(3) Substantial Omissions

(1) *Omission to Aver Knowledge of Guilty Purpose of the Persons Suborned.*

There is no averment that the defendants knew or were to know that the persons were to make the intended false statements knowing the same to be false or not believing them to be true.

The indictment charges that the persons suborned were to swear to certain matters, "when in truth and in fact, as each

of the said persons would then well know, and as they," the defendants, "would then well know," the facts were to the contrary of the matters sworn to, and the matters so to be stated being "matters which the said persons so to be suborned," etc., and the said defendants "would not believe to be true."

The averments, therefore, are—

(1) That the defendants would not believe the intended statements to be true; and,

(2) That the persons to be suborned would not believe their statements to be true.

There is no averment, and not even an indirect or inferential intimation, that the supposed conspirators were to know that the suborned persons would be swearing to what they did not believe to be true.

This knowledge, on the part of the suborner, that the person suborned does not believe the truth of the matter sworn to, is an essential element of subornation.

> "The crime of subornation of perjury has several indispensable ingredients, which must be charged in the indictment, or it will be fatally defective:
>
> "(1) The testimony of the witness suborned must be false.
>
> "(2) It must be given willfully and corruptly by the witness, knowing it to be false.
>
> "(3) The suborner must know or believe that the testimony of the witness given, or about to be given, will be false.
>
> "(4) He must know or believe that the witness will willfully and corruptly testify to facts which he knows to be false."
>
> U. S. *vs.* Dennee, 3 Woods, 41.

An indictment which fails to allege all of the facts, especially the last, is fatally defective.

U. S. *vs.* Dennee, *supra.*
U. S. *vs.* Evans, 19 Fed., 912.
Com. *vs.* Douglass, 5 Metc., 244.
Coyne *vs.* People, 124 Ill., 17.
People *vs.* Ross, 103 Cal., 425.
2 Bishop, Crim. Law, § 1197.

In such a case as that supposed by the indictment, if the defendants, A, B, and C, should make with X, Y, and Z, the persons to be suborned, such illegal contracts as are indicated, and should at the same time, though knowing the contracts to be illegal, assure X, Y, and Z that the arrangement was perfectly proper and lawful, and should believe that X, Y, and Z were persuaded to accept this assurance as correct, then there would be no subornation of perjury, even though X, Y, and Z should know that the transaction was unlawful and should, contrary to the belief of A, B, and C swear to what they knew to be untrue.

(2) *Averments as to Guilty Knowledge and Want of Belief.*

In order to show the guilt of the defendants, it was necessary to aver that they knew that the statements proposed to be procured would be known to be false statements, and that neither they nor the suborned persons would believe them to be true.

This guilty knowledge, with respect to the defendants, must be laid as of two dates, as existing at the time when the scheme of procurement was formed, and as intended to exist at the time of the execution of that scheme.

With respect to the persons suborned, it must appear that it was intended that they should not, when swearing to their statements, believe them to be true.

The only averments as to knowledge are that the defendants "would then well know," and that the suborned persons "would then well know," certain facts which are inconsistent with the statements set out as intended to be procured.

No place at all is assigned as the venue of this knowledge, and the date is indicated only by the word "then."

This word can relate only to the date last stated, and the only date stated in the pleading, June 30, 1902, and to the precise moment of that day at which the plan of subornation

was agreed upon. Taken literally, with reference to that date, the expression is self-contradictory and absurd as implying that on June 30, 1902, the parties "would" know a fact that was known to them at the time. This confusion of a presently existing fact with an expression importing futurity renders the averment repugnant and insensible.

If this averment could be taken more indulgently, it would still be useless for any purpose, because, unless the word "then" fixes the fact on June 30, 1902, it is absolutely indeterminate, and may apply to any date at all.

At the most, it could assign the guilty knowledge to only one of the two necessary dates, leaving the other wholly unprovided for. If, having regard to the conjectural intention of the pleader, it is assigned to the date of the conspiracy, there is nothing to allege the like and equally necessary guilty knowledge at the date of the false swearing.

If the averment be applied to the latter date, there is nothing left to charge such knowledge at the former date. This one averment can not, by the most liberal construction, apply to both dates; the most astute surmise cannot determine with certainty which date the pleader had in mind; so it can not be sufficient for either. The result is that the attempted averment of guilty knowledge fails altogether for want of a date assigned. The situation is much like that in which an indictment, charging conspiracy to obtain public land, was held bad for a less flagrant ambiguity in respect of guilty knowledge.

United States *vs.* Peuschel, 116 Fed., 642.

These allegations, that the persons indicated "would then well know" certain things, are, moreover, only indirect and inferential averments of guilty knowledge. The fact that these people were to know the falsity of their statements appears only upon comparison of the statements as intended to be made with the real facts as it is alleged they were to exist and be known, and is deducible only from the inconsistency alleged to exist between the statements and the truth.

The last averment as to the proposed false statements describes them as "the matters so to be stated, subscribed and sworn, etc., being material matters, etc., and matters which the said persons, etc, would not believe to be true."

The use of the word "being" without limitation of time or place, brings the date and venue of this entire passage down to the date and place at which the indictment was returned, as has been pointed out elsewhere.

As an averment of false intent, this language is even more indefinite than that in respect of guilty knowledge, as it omits the word "then." It is also, like the other, indeterminate as to its intended application, and insufficient, because it could at best apply to only one date, and the want of belief and truthful intent must be laid at two different stages of the proceeding.

(3) *Omission to Aver Falsehood in Fact.*

There is no averment that the statements to be made were to be false in fact, or that the persons suborned were, in swearing to them, to swear falsely.

Neither the word "false" nor the word "falsely" occurs in the indictment. Nor are any words of equivalent import used to characterize the statements alleged as intended to be procured. It is not directly averred even that those statements were, or were to be, untrue or in any way variant from the truth.

The phrase, copied from the statute, "contrary to such oaths," is once employed, but it qualifies only the allegation of the swearing, and is not at all applied to the matter to be sworn to. These words import no more than a disregard of the obligation of the oath, a state of mind which might be predicated of a witness swearing truly and truthfully, so that the expression cannot suggest falsity in the testimony given.

Neither do the averments of facts contrary to those to be sworn to, and that the parties to be concerned would know those contrary facts, amount to a sufficient showing of false-

hood in the statements. Very possibly it may be inferred from these averments that the statements to be made would be false, because such statements as specified would be inconsistent with the real state of affairs as alleged. But such mere deduction from this inconsistency, which is itself observable only by comparison of the statements with the averments of actual fact, cannot take the place of a direct averment that the statements to be sworn to would be untrue and the act of swearing to them would be false or falsely done.

The manifest assumption of the indictment is that it is unnecessary to charge falsehood in the statements to be sworn to or in the act of swearing to them. This theory may rest upon the fact that the statute does not use the words "false," "falsely," or other language importing falsehood, whence it is inferred that the pleader is absolved from any obligation to make averment of such quality not expressly mentioned in the statutory definition of the offense to be charged.

But falsehood in the matter sworn to, and a purpose of swearing falsely in the mind of the witness, are essential ingredients of perjury. All the definitions of the crime employ the word "false" or "falsely" to characterize either the matter sworn to or the intent of the witness, or both:

1 Hawkins, Pleas of the Crown, 429.
3 Institutes, 164.
4 Blackstone's Comm., 137.
2 Russell on Crimes, 596.
Bacon's Abridgment, "Perjury."
2 Bishop, Crim. Law, § 1015.
U. S. *vs.* Moore, 2 Lowell, 235.

Accordingly, the precedents in perjury employ the word "falsely" to characterize the offense, and the authorities pronounce that word indispensable in the indictment:

2 Wharton's Precedents, 7 (No. 577).
Rex *vs.* Perrott, 2 M. & S., 385.
Rex *vs.* Oxley, 3 C. & K., 317.
Morrell *vs.* People, 32 Ill., 499.

Perjury, as defined by the Federal statute, is similar to the common-law offense of the same name. The statute is, therefore, one of those which, as this court has said, must be "read in the light of the common law," and construed after common-law analogies. In adopting the old offense and its old name, Congress is understood to have adopted all that there was of the offense; and the statutory definitions must be expanded by all that is implied in the common-law name. Although the statute does not expressly prescribe that perjured testimony must be false, it cannot be supposed that the legislature intended to make a witness guilty of perjury unless he delivers testimony that is in fact false.

Hence it does not suffice that the indictment follows the words of the statute. It must go further and allege all that is implied by the adoption of a common-law crime.

United States *vs.* Carll, 105 U. S., 611, was an indictment upon section 5431 of the Revised Statutes for uttering a counterfeit. The statute expressly specified an intent to defraud as an element of the offense, but made no mention of guilty knowledge. The indictment followed the language of the statute and omitted any averment as to the knowledge of the accused. On certificate of division of opinion, submitting the question whether the indictment was sufficient after a verdict of guilty, this court held that guilty knowledge, though not included in the statutory definition, must be averred. Said Mr. Justice Gray:

> "In an indictment upon a statute it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.

"The language of the statute on which this indictment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offense at which it is aimed is similar to the common-law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object.

"The indictment, by omitting the allegation, contained in the indictment in United States *vs.* Howell (11 Wall., 432), and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged and counterfeit, fails to charge him with any crime. The omission is matter of substance, and not a defect or imperfection in matter of form only, within the meaning of section 1025 of the Revised Statutes. By the settled rules of criminal pleading, and the authorities above cited, therefore, the question of the sufficiency of the indictment must be answered in the negative."

(4) *Omission to Aver Willfulness.*

There is no averment that the persons to be suborned were to make their intended false oaths willfully.

The word "willfully" occurs only once in the indictment, at a point where it is used to characterize the act of subornation, the purpose of the conspiracy being stated to be "to unlawfully, willfully and corruptly suborn, etc., a large number of persons, etc., to commit the offense of perjury."

In the statement of the perjury supposed to be contemplated, the element of willfulness is not even remotely suggested. The proposed perjury is to be committed by the taking of the oaths, "and by thereupon, contrary to such oaths, stating and subscribing material matters, etc., which they should not believe to be true."

In the more specific account given of the particulars of the scheme, the perjury is stated to consist in swearing to

certain statements, the parties knowing certain facts inconsistent with such statements to be true.

In this setting out of the elements of the intended perjury the word "willful" is not once employed.

The averment that the intended subornation was to be willful on the part of the alleged suborners does not even imply that the false swearing contemplated was intended to be willful on the part of the persons suborned.

The statute prescribes, as a part of the definition of perjury, that the false testimony shall be given "willfully." An indictment which undertakes to set out a case of perjury, whether actual or proposed, and omits this word to characterize the offense, is insufficient to sustain a conviction, because it fails to state this crime in the fullness of its statutory definition.

The word "willful" in the definition of perjury denotes a substantial and essential element of the offense, being the element which distinguishes perjury from mere false swearing done hastily, inadvertently, or under sudden stress of temptation, which latter act is not offense at all.

> "It seemeth that no one ought to be found guilty [of perjury] without clear proof that the false oath alleged against him was taken with some degree of deliberation. For, if upon the whole circumstances of the case, it shall appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to a voluntary and correct perjury, which is of all crimes the most infamous and detestable."
>
> 1 Hawkins, Pleas of the Crown, 429.

All common-law definitions of perjury include the element of willfulness.

1 Hawkins, Pleas of the Crown, 429.
Bacon's Abridgment, "Perjury."
2 Russell on Crimes, 596.
2 Bishop, Crim. Law, § 1015.
Hood *vs.* State, 44 Ala., 81.

Even if the Federal statute omitted the word "willfully," that element would still, after the analogy of the common law, be necessary to be averred.

U. S. *vs.* Carll, 105 U. S., 611.

The omission of an averment of willfulness is fatal to an indictment for perjury.

People *vs.* Ross, 103 Cal., 425.

The word "willful" is not only an essential element in the statutory definitions of perjury, but the dominant and most characteristic element. It is a word the presence of which in any criminal statute cannot be disregarded.

Potter *vs.* U. S., 155 U. S., 438.

Spurr *vs.* U. S., 174 U. S., 728.

The word "willfully" in the definition of a crime makes the evil intent thereby expressed the gravamen of the offense, and an indictment on such a statute which should omit the word would be clearly bad.

Evans *vs.* U. S., 153 U. S., 594.

An averment that the defendant "did commit corrupt and willful perjury" is insufficient to sustain a conviction if the indictment, in setting out the offense, has failed to characterize it as willfully done.

State *vs.* Carland, 3 Devereux, 114.

(5) *No Case Shown in Which an Oath Was Authorized or Material.*

The averments do not show that the false statements alleged as intended to be procured were to be made in any case or proceeding in which oaths were authorized by any law of the United States, or in which the statements would be material.

On the contrary, giving to the allegations of the indictment their greatest possible extension, these statements were to be made without any reference whatever to any proceeding of any kind, whether authorized or unauthorized, whether pending or projected, and there was to be no use made, or intended to be made, of them, in any kind of a case, actual or intended.

As has been pointed out, the attempted statement of the case in which it is alleged the false statements were to be made is extremely obscure and grossly inadequate, by reason of the omission at vital points of necessary averments of time and place, and the confusion and contradiction resulting from the misuse of such averments as do occur.

Disregarding these defects, the proposed case contemplated as the purpose of the conspiracy, as that case is stated in the indictment and identified and limited by the features thereof set out, involved these, and no other, elements:

(1) The suborned persons were to appear before a United States commissioner at Prineville;

(2) They were to swear to certain statements respecting certain public lands in Crook County;

(3) They "would then be applying to enter" those lands under the act of June 3, 1878.

At this point the proceeding was to terminate. So far as the indictment shows, there was no intention on the part of the conspirators, of the suborned persons, or of anybody else to take a further step, or to do anything more than has been stated. It may be assumed that, if the evidence in the possession of the grand jury and the district attorney had indicated any other acts as proposed to be done, such acts would have been stated.

The utmost, therefore, that was within the scope of the conspirators' scheme was to procure certain persons to swear to certain false statements before a commissioner at Prineville, there being no case or other proceeding then pending or projected, at Prineville or elsewhere, in which or with ref-

erence to which the false statements were to be made, filed, or used, or to which the statements would have any relevancy or materiality.

Such a proceeding, manifestly, is not a case such as is contemplated by the statute, or as is within any possible definition of the word. Nor is it a proceeding in which perjury could be committed within any definition of that crime.

Assuming that there were, which there are not, averments of time and place sufficient to show the competency of the officer named, the taking of a false oath before such an officer does not make a case, nor does it, of itself, constitute perjury or any other offense. All that is charged amounts to no more than a gratuitous oath, taken voluntarily, and without any bearing or effect upon anything in the world.

A man may go in succession before every officer in the United States authorized to administer oaths, and swear, before each, to all imaginable falsehoods; but if that is all that he does, no perjury is committed. Unless the oath is taken in, or with reference to, some kind of a proceeding in which such oath is authorized and material, and unless it is, or is to be, used and made effective in such proceeding, there is no offense.

No case or proceeding of any kind, existing or contemplated, is shown by this indictment. Neither is it intimated that it was, or was to be, the purpose of either the defendants or the suborned persons to use the false statements in any case of any kind, at any time, or anywhere. For all that appears, it may have been intended that the suborned persons, after swearing to these false statements, should put the papers into their pockets, or destroy them, or make some other useless and innocent disposition of them. So far as the indictment shows, the swearing was to be done, as an isolated and unrelated act, with no proceeding in existence or in contemplation with which it was to be, or could be, connected; and, upon the oath being taken, the transaction was to cease.

Upon a charge of perjury it must appear on the face of the indictment that some case or some kind of a proceeding

was pending, in which the administration of an oath was authorized, and that the false statements alleged to be made were made in such case and under such oath, and were used and made effective to some material purpose in the proceeding specified.

Smith *vs.* State, 125 Ind., 440.
State *vs.* Geer, 46 Kans., 529.

A false affidavit in support of a motion for continuance will not support an indictment for perjury, unless it appears that the motion was made and the affidavit used in some pending case.

Morrell *vs.* People, 32 Ill., 499.

An indictment for attempting to suborn perjury must show the pendency of some case in which the suborned testimony was intended to be given.

State *vs.* Joaquin, 69 Me., 218.
State *vs.* Howard, 137 Mo., 289.
Barefield *vs.* State, 14 Ala., 603.
Newman *vs.* State, 97 Ga., 367.

And must show that the case was within the jurisdiction of the court in which it is laid.

United States *vs.* Howard, 132 Fed., 325.

The averment that the suborned persons "would then be applying to enter and purchase" the lands under the act of 1878 does not state or imply a case such as manifests the validity and effectiveness of the oaths intended to be procured.

Even if the act of applying were properly laid at the land office, at which lands in Crook County are subject to entry, and where alone entry could be made, the false swearing alleged would not be perjury without some showing of a case pending, or intended to be pending, at the time of the oath

taken; and if such a case were shown, it would still be necessary to aver that the papers were filed, or to be filed, or were in some way to be used and to become effective in the prosecution of such case. The present averments stop far short of any such showing.

But here the intended false swearing is laid with such averments of time and place as necessarily negative the existence, and even the possibility, of a case pending at the date and place of the intended perjury. Taking the averments of the indictment most indulgently, the statement of the proposed offense shows on its face that the assumed case was legally and physically impossible.

For the false swearing alleged to have been intended, the scene is laid, not at the land office, and before the register and receiver, but at Prineville, and before a United States commissioner. It is within the judicial knowledge that there is no land office at Prineville, and that a commissioner resident at that place could not be either a register or a receiver.

It is also judicially known that lands in Crook County, with which alone the accusation concerns itself, are within the district of public lands subject to sale and entry at The Dalles, a town nearly or quite 100 miles distant from Prineville. We have, therefore, an averment of false oaths to be taken at Prineville, where neither entry nor application could be made, and before an officer who was incompetent to allow an entry or to entertain an application. The court know, further, that a proceeding under the act of 1878 is initiated by the filing, with the register and receiver of the proper land office, of a "written statement," in the nature of an application, and that, until this statement is filed and certain fees and commissions paid, no proceeding or case under that act can possibly exist. The false oaths charged as intended to be procured by the defendants are obviously the oaths required by the act of 1878 to be made to this "written statement," and cannot possibly be made, by authority of any law, to any other paper.

It results that, as proposed by the conspirators, the suborned persons were at Prineville to swear to certain papers which must be filed at the land office, 100 miles from Prineville, before there could be any proceeding under the act of 1878; and that these persons were to be "applying to enter" the lands before a commissioner at Prineville, when the initial step in an application was the filing with the register and receiver of the land office.

By the act of 1878, to which the proceeding indicated in the indictment is referred, entry under that statute could be made only by personal appearance of the entryman at the local land office and his making before the register and receiver the oath which was required to be made to the "written statement" prescribed as the initial step in the application. This "written statement" of the statute is, obviously and necessarily, the deposition and declaration intended by the indictment, to which the persons suborned were to make oath. Otherwise, since no other paper of any kind and no other oath are mentioned or warranted by the act of 1878, there would be nothing to which the averments of the indictment could relate for materiality or for authority to administer an oath.

The authority to take before a commissioner the oath required in a proceeding under the act of 1878 is derived from the act of March 11, 1902 (32 Stat., 63), which amends section 2294 of the Revised Statutes so as to make the same read:

> "That hereafter all affidavits, proofs, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, pre-emption, timber-culture, desert-land, and timber and stone acts may, in addition to those now authorized to take such affidavits, proofs and oaths, be made before any United States commisioner, or commissioner of the court exercising Federal jurisdiction in the territory, or before the judge or clerks of any court of record in the land district in which the lands are situated. * * * The proof, affidavit and oath, when so

made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law."

This provision does not authorize or render possible an application elsewhere than at the land office. It simply affords the intending applicant an opportunity to prepare his application papers at another place, but gives those papers no validity, effect, or significance whatever until they are actually placed in the physical possession of the register or receiver. The express enactment is that the documents are to not have their "force and effect" until they are "transmitted to them [the local officers] with the fees and commissions, etc."

Not until that point of time is an application made or a case instituted, or does any kind of proceeding come into being. Until the papers are received at the land office, accompanied by the fees and commissions, a false oath is ineffective and immaterial. Although the intending applicant, meditating perjury, may have sworn falsely before the commissioner, yet there is still left him a *locus pœntentiæ,* which endures until he transmits the false statement, together with the fees and commissions, to the officers of the land office.

Obviously, therefore, the persons to be suborned could not "then be applying to enter and purchase" when swearing to their declarations before the commissioners at Prineville. Even granting that the adverb of time does not, in accordance with the rule of criminal pleading, carry the transaction back to the actual moment of the conspiracy, it must, at any rate, refer to the time of taking the oaths. At the time and place assigned for the false swearing, there could be no applications pending and no proceedings of any kind in progress or even initiated.

The averment that suborned persons would, when swearing before the commissioner at Prineville, be applying to enter

the lands, alleges, therefore, a proceeding which is legally and physically impossible.

The only way in which these oaths taken before the commissioner at Prineville could become effective or material is that pointed out in the act of 1902. The sworn statements become effective when transmitted to the land office, accompanied by the fees and commissions, and not until then does the false swearing become perjury. Unless the scheme of the alleged conspiracy contemplated the transmission of the papers and the money to the land office, the conspirators did not intend perjury as a part of that scheme. Such an intention was as essential to the subornation of perjury as the procurement of false swearing, because unless the sworn statements were filed at the land office they would be mere waste paper and the false oaths altogether innocent.

As to any such transmission of the papers or the money, the indictment is wholly silent. It is not intimated that it was the intention of either the defendants or the suborned persons to file the papers at the land office or to send any fees and commissions to the register and receiver. So far as appears, the whole scheme of the conspiracy contemplated nothing more than the taking of the oaths before a commissioner at Prineville, and that the transaction was to cease at this point. Taking all the facts set out as composing the supposedly unlawful purpose, that purpose extended no further than the procurement of void, vain, and nugatory false swearing, without reference to any case, of any kind, either pending or projected.

The averment, at the close of the indictment proper, as to "the said oaths being oaths administered in cases where a law of the United States would then authorize an oath to be administered," is obviously insufficient to complete the preceding defective statement of an impossible case. This averment is the mere expression of the grand jury's opinion with respect to the legal nature of the proceeding before set

out, and of their conclusion as to the legal effect of the acts which they had in mind as intended to be done.

Such averment of a legal conclusion is palpably insufficient to take the place of the statement of a case, which shall show on its face that it is within the class of cases in which oaths may lawfully be administered, and which, by the mention of time, place, and other circumstances, shall apprise the accused of the particular proceeding which they are called upon to account for.

This averment is, further, on its face inadequate to allege a proceeding in respect of which perjury is predicable, by reason of its failure to aver or even to imply that the case would be of the character described at the time of administering the oath. The word "then" necessarily relates to the only antecedent date, June 30, 1902, on which the formation of the conspiracy is alleged. As the administration of the oaths is indicated as intended to occur at a subsequent time, and the connected words import futurity with reference to the date of the conspiring, the indictment amounts to a declaration only that the oaths were authorized on June 30, 1902, with no suggestion that they were to be authorized at the after date when they were to be administered. The assignment of time for this averment is, moreover, rendered contradictory and repugnant by the use of the word "being," which, upon authorities already set out, fixes the time of the allegation as of the date of the indictment brought, about three years after the alleged conspiracy. For these reasons the concluding clause of the indictment must be disregarded as ineffective for any purpose.

Because no case is stated in which the oaths alleged as intended to be procured would be authorized, the indictment is insufficient to support a conviction.

(6) *Omission to Aver the Competency of the Officer.*

There is no sufficient averment that the oaths proposed to be procured were to be taken "before a competent tribunal, officer, or other person."

It is alleged that the suborned persons were "to come in person before him, the said Marion R. Biggs, who was then and there a United States commissioner for the said district of Oregon," and were to be "duly sworn by and before him, the said Marion R. Biggs, as such United States commissioner."

Toward the close of the indictment proper occurs the expression, "the said Marion R. Biggs, United States commissioner, as aforesaid, when administering such oaths to those persons, being an officer and person authorized by the laws of the said United States to administer the same oaths."

Neither time nor place is laid for the official character or official action of Biggs except by the phrase "then and there," once occurring.

That phrase, upon familiar rules of construction, can relate only to the date and place last mentioned, June 30, 1902, at Prineville, and it refers the fact alleged to the precise moment of the fact laid as of the previous date and place, which former fact is the formation of the conspiracy. The whole averment, therefore, amounts only to saying that Biggs was a commissioner and at Prineville when he joined with the other defendants in the unlawful agreement.

This does not imply that Biggs was, or was expected to be, a commissioner, or at Prineville, or elsewhere in Oregon, at the time when it was intended that the oaths should be administered.

In the nature of the case, it is impossible that the oaths should be administered at the very moment when it was agreed to procure the swearing to be done, and it is scarcely possible that it should have been intended to procure that to be done on the same day that the conspiracy was effected.

However that may be, this averment that Biggs was a commissioner at Prineville on June 30 does not show or imply that he was, or was expected to be, a commissioner at any future time or at a later hour on the same day.

Nor is it said that Biggs, when administering the oaths, was to be at Prineville or at any other place in the District of Oregon, or that the scheme of the conspirators contemplated that the suborned persons should come before him at any place with the territorial limits of his official authority. The fact that Biggs was "then and there," that is on June 30, at Prineville, affords no warrant for supposing that the conspirators expected him to remain there, or that the suborned persons should come before him there, or that the oaths should be administered there, or that these things should occur at any other place in Oregon.

The final averment on this point is, like those preceding, wholly wanting in specification of place. It undertakes to allege that Biggs was an authorized officer "when administering such oaths," which fixes no time, because no date is assigned for the administration of the oaths, and the use of the word "being," without limitation of time or place, throws the whole transaction forward to the date of the indictment, in February, 1905, which leaves the averment without any significance.

To the competency and authority of the officer to administer oaths, time and place were essential. The omission of these circumstances leaves the indictment without any showing as to the validity of the oaths proposed to be procured.

Where the authority of an inferior officer, or of one whose authority is limited to certain territory, is alleged, every fact necessary to show his jurisdiction and official competency must be set out.

People *vs.* Jackson, 95 N. Y. Supp., 286.
Gunning *vs.* People, 189 Ill., 165.
Rex *vs.* Everett, 8 B. & C., 117.

In such a perjury as this indictment undertakes to charge, place is of the very essence of the offense. The authority of the commissioner to administer any oath depends upon his

acting within the district for which he is commissioned. The validity and obligation of the oath required by the act of 1878, if the same be taken before a commissioner, depends by the very terms of the act of 1902 upon its being within the land district within which the lands sought to be entered are situate. In the cases supposed by the indictment to be within the purview of the alleged conspiracy, the oaths intended to be procured must have been administered and taken within the limits of The Dalles land district, else there could be no perjury. If Biggs should assume to act outside of Oregon, his attempted administration of the oaths would have been merely void; and if the application papers should be executed without the land district, they would not have been the sworn statements prescribed by the act of 1878, which are assigned by the indictment as the subject-matter of the alleged perjury, but such papers would have been utterly ineffective as applications to enter under that statute.

Quite possibly an extra-territorial act of the commissioner, if certified as done within the region of his official authority, or an application to enter executed without the district and falsely represented to have been signed and sworn to within the district, would have been fraudulent and criminal, either as forgeries, official misconduct, or attempts to defraud the United States. But the present case does not involve, nor can it be made to involve, any such offenses, the only crime alleged being perjury, and the facts set out being relevant, if relevant at all, only to that charge.

The place at which the false swearing was intended to be committed was, therefore, with reference to the question of perjury *vel non*, not merely material, but absolutely vital. If the persons suborned were to meet Biggs elsewhere than within the land district, they might commit a multitude of other possible offenses, such as forgery, fraudulent representation, murder, or larceny, but perjury never by any possibility.

The indictment nowhere affords a hint as to the proposed locality of the false swearing alleged as the purpose of the conspiracy. All that is said is: (1) that Biggs and the two others conspired at Prineville on June 30, 1902, and (2) that Biggs "was then and there United States commissioner." This means that, on the day certainly, if not at the moment, of the conspiracy Biggs was at Prineville and was a United States commissioner.

It is not equivalent to saying that Biggs was to remain, or did remain, at Prineville, or that he was expected to continue, or did continue, to be a commissioner, either at Prineville or elsewhere. It does not suggest that, at the time in the immediate or the remote future when the false swearing was to be done, he should be an officer of any kind, or should act or affect to act in any official capacity, or that he should be at Prineville or within the District of Oregon.

Still less is there of suggestion that the false swearing was to be performed at Prineville, or even in the State of Oregon or elsewhere within the United States. The plan was, as stated, that the "said persons were to come in person before him, the said Marion R. Biggs, who was then and there a United States commissioner, etc." It is true that, as averred, these persons were to be "duly sworn by and before him, the said Marion R. Biggs, as such United States commissioner;" but that is not saying, or even implying, that Biggs was really to be a commissioner at the future time had in mind, or that the persons were to be sworn by him at any place where he would have authority to act officially, or even at any other particular place. The very utmost that can be drawn from the indictment is that Biggs was a commissioner, who happened to be at Prineville on a date which was necessarily anterior to the time at which the false swearing was to be committed. From this it cannot even be inferred that he was at the latter date to be either an officer or within the District of Oregon.

It results that the validity and binding force of the oaths mentioned as intended to be procured are not shown, because there is no designation of the place upon which depended the authority of the officer named to act. All that is alleged in this indictment might be literally true, and yet, if the purpose of the conspirators was to cause the persons suborned to appear before Biggs at some future date, after his commission should have expired, or at some place in Idaho, or British Columbia, or at sea, there would and could be no perjury committed.

Because the indictment fails to show that the false swearing alleged to have been intended was intended to be done before a competent officer, it is insufficient to support a conviction.

(7) *Omission to Aver the Sufficiency of the Oaths.*

There is no averment that the conspiracy contemplated the administration of any oath, the violation of which would be perjury under the statute.

Two forms of oath are prescribed by section 5392 of the Revised Statutes upon either of which a prosecution for perjury may be based:

(1) An oath that the witness "will testify, declare, depose, or certify truly," and,

(2) "That any written testimony, declaration, deposition or certificate by him subscribed is true."

An indictment for perjury must set out or indicate the substance of the oath supposed to have been violated, and show that the tenor of such oath conforms to that prescribed or authorized by some statute.

U. S. *vs.* Howard, 132 Fed., 325.

The two oaths authorized by the statute differ essentially in their tenor, and are adapted to fit, respectively, two diverse and inconsistent situations.

The former of the two is intended only for the case where the witness is sworn in advance of his giving testimony, and where his testimony is to be given orally. It is prospective in its terms and binds the affiant to a promise that he will testify truly in his testimony to be given in the future. Such an oath can apply only to statements to be delivered by word of mouth, which may or may not be reduced to writing as the witness proceeds, and so become a deposition. It is impossible for a witness to swear that he will testify truly when it is intended only that he will sign, or has signed, something already embodied in a written document.

The latter form of oath is, by its terms, limited to the situation where the matter to be sworn to has already been reduced to writing and subscribed by the witness. The statute expressly prescribes a writing and a subscription before the affidavit is sworn, and the formula prescribed is applicable only to that state of affairs.

The indictment at two points alleges two different forms of oaths as intended to be procured by the conspirators. Neither of the oaths alleged conforms to either of the oaths prescribed by the statute, and the two forms are inconsistent with each other.

It is first averred that the conspiracy contemplated that the persons to be suborned should commit perjury, "by taking their oaths that they would declare and depose truly that certain declarations and depositions by them to be subscribed were true."

The oath here indicated is a curious confusion of the two oaths prescribed by the statute as alternatives, and the combination of diverse elements from the inconsistent forms reduces the oath as stated to nonsense.

The statute provides that in giving oral testimony the witness may swear that "he will testify," etc., "truly." The oath, as first stated in the indictment, relates to written testimony. The statutory form pledges the veracity of the affiant to the truth of future statements to be made by him. The oath of the indictment is a promise on the part of the

affiants that they will, at a future time, "declare and depose" that certain declarations and depositions which they were thereafter to subscribe "were true."

This is simply an undertaking under oath whereby the affiant should bind himself, at some subsequent and indefinite time, to make a certain specific declaration respecting a certain deposition. Such an oath would be utterly unwarranted by any law or custom, even if a situation could be conceived in which any one could desire another to assume an obligation of such extraordinary and bizarre a character.

When or where these declarations and depositions were to be subscribed, whether before or after the taking of the oaths, whether in Oregon or elsewhere, does not appear, even by inference. Neither is it intimated when or where the depositions were to come into existence, whether before or after the subscription or the swearing, or whether before or after the formation of the conspiracy, or whether in the United States, on the high seas, or in a foreign country.

Nor does it appear with reference to what time the suborned persons were to speak in declaring that their previously made depositions "were true." This projected assertion of truth could not possibly relate to the time of making the assertion, because the use of the past tense would necessarily refer the truth of the matter to a date anterior to the time of declaring. At what point or how far back in the past the truth of the statement was to be referred is not attempted to be indicated, whether as of the day before, or at the discovery of America, or at the beginning of the world. The statute authorizes an affiant to swear that his statements embodied in a written document are true as a present fact, but not that they "were true" at some indefinite date in the past.

It is, moreover, impossible to understand how or why any affiant should be sworn "to testify truly" that his testimony, whether past or future, was or would be true. A man may promise on oath that he will testify truly, or that his testi-

mony to be given shall be true, or he may swear that his statements before made are true. But it is scarcely possible, and not at all warranted by any law or any customary forms of proceeding, that he shall bind himself to testify truly that certain things were or are to be true.

The second form of oath alleged by the indictment as intended to be procured was to be taken by the suborned persons, who were to go before the commissioner and, "after being duly sworn to state and subscribe under their oaths that certain public lands * * * were not being purchased, etc.," together with other facts.

This oath seems intended to be modeled after the second of the statutory forms, which form is applicable only in the case of one subscribing to "any written testimony, declaration, etc." There is here no mention or suggestion of any written testimony or other matter in writing as intended to be procured or sworn to; and no inference that such was in the mind of the grand jury or of the conspirators can be drawn from the mere use of the word "subscribed." The oath authorized by the statute can be administered only to a person who has previously subscribed the written matter. But the proposed transaction, as stated in the indictment, contemplates that the oath shall first be administered, and that the affiants, "after being sworn," shall "state and subscribe" certain facts. The statutory formula requires that the affiant shall swear that his statements previously reduced to writing and subscribed by him are true. The oath as set out in the indictment does not suggest the truth of anything, but only that the affiants shall proceed to state certain facts.

This averment of the second oath is, moreover, ambiguous, if not utterly insensible. The suborned persons were to be caused to go before the commissioner, "and, after being duly sworn * * * to state and subscribe under their oaths that" certain facts existed. This certainly does not mean that they were to be sworn to speak the truth, or to testify truly, or were to swear that their written statements were true.

It seems to mean that they were to be "only sworn * * * to state and subscribe" the facts indicated. In other words, the language imports an obligation to state and subscribe certain things. Such an obligation, besides being quite foreign to the effect of either of the statutory oaths, is nonsensical and frivolous. A man may oblige himself by an oath to do anything or to say any particular thing; but that is a very different matter from swearing to testify truly or that certain things are true; and an oath by which a man binds himself to state and subscribe certain specified things is of no legal obligation.

It results that the scheme of the conspiracy, as set out in the indictment, included the procurement of two distinct oaths, neither of which was warranted by the statute or any other law, neither of which would impose upon the affiants any obligation, both of which are incredible if not insensible, and which are essentially diverse and mutually inconsistent. As only one oath could have been intended by the conspirators to be procured, or by the grand jury to be alleged, and as the two stated in the indictment cannot stand together, it is impossible to say which was the oath sought to be charged, an ambiguity which would be fatal to the pleading if either of the two were stated as a valid oath under the statute.

(8) *Omission to Aver the Statements to be in Writing.*

There is no averment that the false statements alleged as intended to be procured were to be written statements, such as are required by the act of 1878, or were to be in writing at all.

The whole proceeding alleged to have been contemplated as the purpose of the conspiracy, and to which the proposed perjury was to be incident, was the purchase of timber and stone lands under the act of June 3, 1878. The lands are described as subject to entry under that act, and the statute itself is expressly referred to for the sake of identifying the

nature and purpose of the transaction to which the conspiracy was addressed. Moreover, the tenor of the intended false statements, as alleged, follows the very language prescribed by that statute for the written statements which the statute authorizes to be sworn to, which evinces the pleader's purpose to ground his charge upon that statutory authorization. And unless the alleged perjury was to be committed in respect of these statements, there is no other enactment to which the wording of the indictment at all conforms and upon which it can be predicated.

The act of 1878 requires and authorizes an oath to be administered at only one stage of the proceeding thereunder, and that is the oath to the written statement, provided for in section 2 of the statute, as the first step to be taken by the applicant. Even if it could be granted, agreeably to the contention of the prosecution at the trial of this case, that under section 3 the Commissioner of the General Land Office may properly require an oath to the final proof, still the scope of the final proof, as defined by that section, is limited to other matters than those here alleged as intended to be sworn to. If the same matters were also, and properly, included by the Commissioner in the final proof, that must have been in virtue of some such regulations as those authorized by section 3 to be prescribed by that officer; and there is no averment of any such regulations which would show that these statements could be lawfully made, and an oath to them exacted, in connection with the final proof. It must, therefore, be understood that the false swearing supposed to have been intended to be procured was with respect to the "written statements" authorized by section 2 of the act of 1878.

That this statement shall be a written one is the express requirement of that section. In the absence of a written statement, the applicant cannot advance a single step toward acquiring land under the act of 1878. Indeed, until his statement is written, sworn to, and filed, and the fees and commissions paid, he is not an applicant at all, and the pro-

ceeding is not begun. If the statement is not written, it is of no possible validity or significance, and no perjury could be committed in reference to it, or otherwise under the act of 1878.

Unless, therefore, the design of this alleged conspiracy embraced statements in writing, the scheme would not only be impossible of execution, but it could by no possibility involve or lead to perjury, or make perjury possible. Everything alleged in this indictment, with all its implications, might be perfectly true; and yet, so long as the false oaths to be procured were not intended to be made and attached to some statements in writing there would be no offense. The existence of the supposed false statements in written form was an indispensable element of the alleged perjury, and it was one which demanded direct, positive, explicit and circumstantial averment.

There is nowhere in the indictment any direct allegation that the conspiracy contemplated the preparation or use of any kind of documents or written papers. Very possibly, in the laxity of popular speech, the use of the word "deposition" would imply something written, and the phrase "to be subscribed" might presuppose the existence of a document. But in a criminal pleading, the existence of matters essential to the offense cannot be left to rest upon implication and presupposition. Still less can the validity and sufficiency of a written instrument be inferred from the fact that it is called a deposition and is alleged to be subscribed.

Where the statute requires the statement in respect of which perjury is charged to be in writing, the indictment is fatally defective if it fails to show that such statement was written.

State *vs.* Simons, 30 Vt., 620.

One who falsely on oath denies a promise which is by the statute of frauds required to be in writing does not commit perjury; because the promise by parol does not bind the

party, and so the proof of it by parol has no tendency to establish any question in issue:

2 Bishop, Crim. Law, § 1038.

Rex *vs.* Dunstan, Ryan & M., 109.

(9) *Omission to Aver Statements as Contrary to the Oaths.*

The indictment does not sufficiently charge that the suborned persons were to swear contrary to their oaths.

The statute expressly prescribed as one of the essential ingredients of the crime of perjury that the offender shall make the untrue statement "contrary to his oath."

An indictment which undertakes to set out the offense of perjury and omits this statutory element is, upon the principles already stated, insufficient to support a conviction.

The present indictment uses this statutory phrase but once; that is in the preliminary and general statement of the purpose of the conspiracy, which is said to be to procure the suborned persons to take their oaths and to commit perjury by "thereupon, contrary to such oaths, stating and subscribing material matters, etc."

This passage of the indictment is, of course, the statement of a mere abstraction, which the pleader himself understood to be insufficient as a charge of any crime. In the setting forth of the concrete scheme alleged to be intended, wherein the elements of the offense are attempted to be enumerated and its constituent acts specified, there is no suggestion that the swearing alleged to be intended was to be done by the suborned persons contrary to their oaths.

Upon the principles of criminal pleading hereinbefore stated, this exhibition of the supposedly unlawful scheme must include, among the other elements constituting the perjury intended to be alleged, the averment that the false statements charged as part of that scheme were to be contrary to the oaths of the persons suborned. Because the attempted enumeration of the ingredients of the offense omits

this statutory element of the definition, the indictment is fatally defective.

We submit that a conspiracy to commit the crime of subornation of perjury is impossible; but we submit, further, that even if a valid indictment might be framed charging a conspiracy to commit that offense, the indictment in this case is utterly insufficient for the purpose, but is fatally defective, and that therefore the demurrer and the motion in arrest of judgment should have been sustained.

II.

The Exceptions.

Under this head we propose to discuss the errors committed by the court during the trial in admitting and rejecting evidence and in granting and refusing instructions to the jury.

(1) The Final Proofs.

Error was committed by the court in admitting evidence of the making of the final proofs of various persons, and of the contents of such proofs, and of the intentions entertained by the applicants at the time of making final proof.

The final proof of B. F. Jones was admitted without exception (Rec., 78); but objection was made and exception taken to this question put to that witness: "Now, at the time you made this final proof, what was your intention as to what you would do with the land when you got the title to it?" (Rec., 81, 82).

The final proof of J. S. Watkins was objected to on the ground that it was incompetent, immaterial and in no way binding upon the defendants, being the act of a stranger to the alleged conspiracy, done after the object of the conspiracy had been accomplished. The proof was admitted

over this objection, and an exception was taken (Rec., 139, 140).

C. Feuerhelm was questioned, over objection and exception of defendants, as to his knowledge of certain matters at the time of his final proof, and as to the truth of the answers made by him on that occasion (Rec., 249, 250, 251), the manifest purpose being to show that the witness had sworn falsely in his proof.

At the close of its case in chief, the Government offered the final proofs of nine persons, who do not appear to have been in any way connected with the alleged conspiracy, who had not been produced as witnesses, and as to whom there was no evidence that they had been suborned or attempted to be suborned, or that they had made any contracts of any kind with any of the defendants. To this offer objection was made, and after the papers had been admitted, motion was made to strike out all testimony relative to final proofs. To the action of the court adverse to defendants in each case an exception was reserved (Rec., 394).

The final proof of Joel Calavan was also admitted, and the witness allowed to be questioned concerning his intentions and understanding in making such proof, all over defendants' objections and exceptions (Rec., 168).

Defendants excepted to the refusal of an instruction excluding the final proofs from consideration in respect of perjury (Rec., 705). The court affirmatively instructed the jury that perjury might be committed by false swearing at the final proof, to which the defendants excepted (Rec., 688, 691, 696, 697).

It seems that, at the two previous trials of the case, the presiding judge had excluded the final proofs and limited the prosecution to the showing of falsehood in the applications, a ruling which had become the law of the case (Rec., 81, 82). The third trial was conducted by another judge, who held that perjury at the final proofs was within the averments of the indictment.

That this last ruling was erroneous appears from several considerations.

(1) The act of 1878, in section 2, prescribes the form of statement to be sworn to by the applicant at the initiation of the proceeding. In this statement the applicant must aver that he does not take the land on speculation and that he has made no contract whereby his proposed entry shall inure to the benefit of any other person. The indictment, in designating the perjury alleged to have been intended, follows the language of this section, necessarily manifesting the purpose of the pleader to ground his charge upon falsehood in the "written statements" of section 2, and to indicate the application as the proceeding intended, and the oath to the written statement as the oath authorized by law to be administered. No other proceeding and no other oath are authorized by any statute to which the wording of the indictment at all conforms.

The charge, therefore, is limited to alleged perjury in the preliminary written statements. The introduction of evidence showing perjury in the final proofs was an attempt to prove the commission of another crime than that set out in the indictment, at another time and at another place, in a different proceeding, and at a point when the alleged purpose of the conspiracy had been accomplished. This independent offense, if committed at all, was committed by strangers to the conspiracy; and there is no intimation in the indictment that such subsequent perjury was to be done by the procurement or with the knowledge of the defendants, or was in any manner within the scope of the alleged unlawful scheme.

The purpose of this proof was, therefore, to show the commission by the defendants of an offense distinct from and independent of that charged in the indictment, and it could not fail to operate to their prejudice.

(2) Perjury in respect of the matters specified in the indictment could not be predicated upon false statements sworn to in the final proofs.

The oath by which the applicant affirms that he does not take the land on speculation, and denies that he has made a contract of the nature forbidden by the statute, is authorized only in section 2 of the act of 1878, and required only at the time of the application.

The subject-matter of the final proof is prescribed by section 3 of the act, and is by that section limited to certain specified things, which do not include the intention of the applicant or the previous making of a contract for the sale of the land. By the terms of this section, the intending entryman "shall furnish to the register of the land office satisfactory evidence" of the facts which are enumerated. These facts include the publication of a notice, the timbered character of the land, its uninhabited and unoccupied condition, and the apparent absence of mineral deposits. Some of these facts are among those to be sworn to in the preliminary statement, some are additional facts, and some of the facts embodied in the formula of the application affidavit are omitted from the list of those required to be established by the final proof.

Among the facts to be sworn to at the date of application, but not required to be shown in the final proof, are the intention of the applicant and his freedom from obligation to transfer the land.

Upon making proof of the facts specified in section 3, and "upon making payment to the proper officer" of the purchase price and the legal fees and commissions, the act provides that "the applicant may be permitted to enter said tract."

The provision for final proof, therefore, embodies an explicit and specific statement of the matters which are to be the subject of such proof. This statement adopts some of the requirements prescribed for the preliminary application, and omits others, the omitted matters being those in respect of which, in this indictment, perjury is assigned.

The expression of the facts to be included in the final proof is the exclusion of others not expressed. The frame of

section 3 is such as to limit the scope of the final proof to the matters therein specified as to be proven, and to leave no room for the addition of other matters. There is no authority for compelling the applicant to swear, at the time of his proof, that he has not contracted to sell the land, and that is not a proceeding in which any law authorizes such an oath to be administered.

It results that false swearing in the final proofs could not be perjury, or any offense of which subornation could be asserted, even if the intention to procure such false swearing had been alleged in the indictment.

(3) But it seems to have been urged at the trial that the Commissioner of the General Land Office has provided, by authorized regulations, that the applicant shall be examined, at his making of final proof, respecting his intentions and any possible contract for the sale of the land. Hence it appears to have been inferred these applicants committed perjury if they swore falsely on that occasion upon that subject.

The indictment neither avers nor mentions any such regulations, nor does it set out the tenor of the oaths supposed to be prescribed by the assumed regulations. It is impossible, therefore, to see that the false statements specified were, or would be, contrary to the statements required by any such regulations, or that those false statements would be in violation of the regulations. In such a case, where reliance is had upon executive regulations, supposed to have the force of law, the indictment must set out, or at least refer to, the regulations.

U. S. *vs.* Bedgood, 49 Fed., 54.

(4) Assuming, however, that such regulations, if they exist, are matters of judicial knowledge, the false swearing specified in the indictment would, if done in the final proof, be an offense only against the executive regulation, and not against the statute. It must be conceded that the act does

not require any statement in the final proof respecting the applicant's intentions or agreements concerning the sale of the land. If the Commissioner has undertaken to exact a statement on that subject, then false swearing on the point would be in violation of a duty created, not by any statute, but solely by the fiat of an executive officer.

Caha *vs.* United States, 152 U. S., 211, holding that perjury may be committed by false swearing in a contest case, does not meet the present difficulty. A contest, as the court held in that case, is a proceeding authorized and recognized by statute. The departmental rules of practice, mentioned in the opinion, were not involved to show the authority to conduct a contest or to administer an oath. Those rules do not undertake to authorize the administration of oaths, or to define the cases in which they may be administered, or to prescribe the subjects with reference to which oaths must be taken. All these matters are, and were in that case, provided for by law, and the accused was charged with the violation, not of the rules of practice or of any other executive requirements, but of section 5392 of the Revised Statutes. This duty to deliver true testimony on the subjects upon which he was examined was a duty imposed by law and not by some official regulation.

Here, on the other hand, if the applicants were bound to swear truly at the final proof upon subjects not specified in section 3 of the statute, that duty arose, not by reason of the statute, but by reason of some order of the Commissioner. It may be granted, for present purposes of argument, that the act gives the Commissioner power to frame regulations which may exact oaths to facts not specified in the act itself; but it remains true that false swearing in respect of such extra-statutory facts is contrary to the requirement of the Commissioner only, and not a violation of any statutory duty.

An officer, having by statute power to prescribe regulations for the conduct of his official business, may enforce

the same in any way possible by the exercise of his official authority; but he cannot, by such power, make the disregard of his requirements a criminal offense, and no indictment will lie for violating an official regulation.

U. S. *vs.* Eaton, 144 U. S., 677.
U. S. *vs.* Manion, 44 Fed., 800.
U. S. *vs.* Bedgood, 49 Fed., 54.
U. S. *vs.* Blasingame, 116 Fed., 654.

Thus, where the Commissioner of the General Land Office, in the exercise of an undoubted power, prescribed that in all cases of homestead entry there should be filed an affidavit showing the non-mineral character of the land, it was held that, since no statute required such an affidavit, it was not one upon which perjury could be laid.

U. S. *vs.* Maid, 116 Fed., 650.
U. S. *vs.* Howard, 37 Fed., 666.

United States *vs.* Bailey, 9 Pet., 238, apparently relied upon in the trial court, was not a case of a violated regulation, but of false swearing upon a matter in respect of which the affiant was by law obligated to testify truly. The regulation of the Treasury Department related solely to the competency of the officer by whom the oath was administered, and the effect of the case is to hold that the Secretary of the Treasury had power to say that he would accept oaths administered by such an officer. But here the question is, not as to the power of the Commissioner to designate the officers before whom final proofs may be taken, but as to his power to exact any proof at all upon a matter not within any statutory requirement. In other words, where the statute imposes upon the applicant no duty to make a statement, the Commissioner cannot create such a duty in that regard as that neglect of it may be punished criminally.

(5) The power of the Commissioner of the General Land Office to prescribe regulations to give effect to the act does

not extend to requiring applicants to swear to matters not required by the statute to be sworn to.

The regulations which the Commissioner is empowered to make are only those by which "effect shall be given to the foregoing provisions of this act." The authority given is limited to effecting the provisions of the statute; it does not include the addition of new provisions or the exacting of additional requirements. Where the statute says that the final proof shall be addressed to certain subjects, it is not within the competency of the Commissioner to say that other matters shall be made the subject of the applicant's examination. Such a regulation would not be to give effect to any provisions of the act, but to give effect to some purposes of the Commissioner which are outside the provisions of the act, and altogether foreign to the purposes of the legislature. It is clear that when the act says that facts A, B, and C shall be proved, the Commissioner cannot go beyond the statutory enumeration and exact proof of facts X, Y, and Z. If the Commissioner has power, in his individual discretion, and without reference to the provisions of the act, thus to demand proof of any facts he may choose, the scope of the examination and the applicant's liability to commit perjury are limited only by the officer's private views of public policy and administrative expediency, or perhaps by his personal prepossessions upon political and religious subjects and private morality. Such an unlimited and so dangerous a grant of power is quite inconsistent with the careful wording and cautious restrictions of the act of 1878.

It follows that the regulations of the Commissioner may properly provide for an oath to the matters set out in this indictment only at the date of the application. If the Commissioner has undertaken to require that the same statements shall be sworn to in the course of the final proof, such requirement goes beyond the provisions of the statute, and therefore exceeds the authority of the officer in the premises.

An executive officer, empowered to make regulations for the effective execution of a law, cannot by such regulations add to or limit the provisions of the law.

Morrill *vs.* Jones, 106 U. S., 466.

(6) The applicants had the right to sell, or to contract to sell, the lands at any time after application made, whether before or after final proof.

The whole theory as to the possibility of perjury in the final proof rests upon the assumption that such an agreement to sell as is made the subject of the indictment would be a violation of the law if made before final proof. On this assumption alone can it be supposed that the Commissioner could properly require the applicant to negative such an agreement in his final proof; and only upon this assumption can the truth or falsity of the applicant's statements on this point be considered material or have any relevancy to a charge of perjury. This theory and this assumption are wholly unfounded upon anything in the statute, and are contrary to the clear implication of the act of 1878, to the general principles of public-land law on the subject, and to the law on this point as declared by this court.

The act of 1878, in section 2, requires the applicant, at the time of application, to swear that he has made no contract whereby his proposed entry shall inure to the benefit of any one else. In section 3 it obliges the applicant at the final proof to swear to several other things, but not to this fact. The clear implication is that the statute intends that the application shall be made without any agreement to convey, but that such an agreement may be made at any time after the application, and may exist at the time of the final proof.

In all legislation respecting public lands, where it has been desired to prohibit alienation of inchoate titles, such prohibition has been expressly made, and the point in the proceeding before which the claimant is forbidden to sell

has been specifically fixed. And the settled rule of construction in such cases is that, unless alienation is forbidden by some statute, the applicant or entryman may innocently and validly transfer his incipient right.

In the absence of some express statutory inhibition, any right or claim under the public-land laws is assignable at any stage of its development.

Thredgill *vs.* Pintard, 12 How., 24.
Sparrow *vs.* Strong, 3 Wall., 97.
Lamb *vs.* Davenport, 18 Wall., 307.

A prohibition against such assignment will not be extended by construction to apply at a later stage of the proceeding than is made necessary by the words of the statute.

Myers *vs.* Croft, 13 Wall., 291.

Nor can such a prohibition in another act *in pari materia* be read into an act in which no such prohibition is inserted by the legislature.

French *vs.* Spencer, 21 How., 228.
Maxwell *vs.* Moore, 22 How., 185.

The right to make a soldier's additional homestead entry is assignable, although an original homestead is not.

Webster *vs.* Luther, 163 U. S., 331.
Barnes *vs.* Poirier, 27 U. S. App., 500.

This principle has been recently applied by this court in the construction, respecting this point, of the timber-culture act of June 14, 1878 (20 Stat., 113). This act was passed only eleven days after the timber and stone land act. In its second section it requires that the intending entryman shall, as in the case of a timber-land applicant, swear that his entry is made for his own exclusive use and benefit, not for speculation, and not for the benefit of any other person. It is further provided that on making final proof the entry-

man shall establish certain facts, of which non-alienation is not one.

Adams *vs.* Church, 193 U. S., 510, was a case in which an entryman under the timber-culture act of June 14, 1878, had, prior to his making the final proof required by that act, bargained for the transfer of the title which he expected to acquire. This court held that such an agreement was valid, and not contrary to any requirement of the timber-culture act, although that act, like the timber and stone land act, passed eleven days before, requires the applicant, in his initial statement, to swear that the entry is for his own exclusive use and benefit, and that he has made no agreement whereby the title he is seeking may inure to the benefit of anyone else. In distinguishing the case from one of alienation before final proof upon a homestead entry, it was said by Mr. Justice Day:

> "There is no requirement in the latter [the timber-culture] act that the entryman shall make oath that he has not alienated any interest in the land. The policy of the Government to require such affidavit when it intends to make it a condition precedent to granting a title was indicated in the homestead act, and could readily have been pursued by a similar provision in the timber-culture act if it was intended to extend the principle to that statute. * * *
>
> "As the law does not require affidavit before final certificate that no interest in the land has been sold, we perceive no reason why such contract as was found by the Supreme Court of Oregon to exist would vitiate the agreement to convey after the certificate is granted and the patent issued. If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that during his term of occupancy he has agreed to convey an interest, to be conveyed after patent issued, which will defeat his claim and forfeit his right. * * *

Had Congress intended such result to follow from the alienation of an interest after entry in good faith, it would have so declared in the law."

(2) Character of Land.

Error was committed in permitting the prosecution to offer evidence tending to show that the lands were not of such character as to be subject to entry under the act of 1878.

The indictment alleges the unlawful purpose of the defendants to have been to procure the commission of perjury in a proceeding to purchase certain public lands "open to entry and purchase under the acts of Congress approved June 3, 1878, and August 4, 1892, and known as timber and stone lands."

The acts of Congress mentioned are by their terms applicable only to lands which are valuable chiefly for the timber or stone thereon. The lands in question are, therefore, both directly and by reference, averred to be of that character.

No perjury is assigned upon any statements to be made or procured to be made in respect of the character of the lands. Indeed, it is not suggested that any statements, true or false, were to be made on this subject. The whole charge is of false statements to be procured in relation to the intentions of the persons to be suborned, and to the existence of agreements to sell the lands.

Upon elementary principles of criminal procedure, the proof of the prosecution was limited to falsehood in the statements specified in the indictment.

Upon elementary principles of estoppel the Government was bound by its own averment as to the character of the lands.

Notwithstanding these facts, the Government was allowed, over exceptions, to introduce a considerable volume of evidence tending to prove that the lands were not chiefly valuable for timber, the avowed purpose being to show that the

scheme imputed to the defendants included the subornation of perjury upon that matter, which was not assigned as the subject of perjury. (Rec., 138, 139, 216, 248, 297 *et seq.*, 325, 326, 346 *et seq.*, 354, 355 *et seq.*, 661, 662, 664, 665 *et seq.*)

Exception was taken also to the refusal of an instruction that no perjury was charged in regard to the character of the lands (Rec., 703).

Some, perhaps the most positive, of this evidence related to the character, not of any lands mentioned in the indictment, and concerning which the perjury was alleged to be suborned, but to other lands, which lands were entered by the plaintiff in error and Mrs. Williamson and by the defendant Biggs.

The theory, it appears, was that if these persons themselves committed, in respect of other lands, a perjury concerning another matter, then Williamson must have conspired to suborn perjury in regard to illicit contracts.

The effect of this proof, if believed by the jury, was to prove the commission by the defendants of an independent, substantive offense, not charged in the indictment, that is, subornation of perjury with respect to the character of the lands.

Had the indictment been silent with respect to the character of the lands, this proof would have been a surprise to the defendants, being upon a point which they could not be expected to anticipate and for which they could not prepare proof to the contrary. The affirmative averment of the indictment as to this subject must necessarily have lulled them into a false security in the premises, so that, even had it occurred to them that the matter might be drawn in question, they would have dismissed their doubts in reliance upon that averment. To allow the subject to be open under such circumstances was manifestly an actual prejudice to the defendants.

The theory upon which this surprise was permitted to be sprung is thus stated by the court in its instructions:

> "The relevancy of such evidence is the relationship it may have to the motive or intent or design of the defendants in the doing of the act charged against them in the indictment under which they are tried" (Rec., 694).

Waiving for the present the competency of such collateral offenses as bearing upon the question of intent, it is submitted that if the Government desired to resort to such proof to show intent or motive, it should, at least, have kept silent on the subject when informing the defendants of what they were charged to be guilty. Had nothing been said in the indictment about the character of the lands, it might have been an open question whether proof on that point might not be adduced to explain transactions directly involved in the charge. But in the face of the express declaration that the lands were properly subject to entry, it was clearly erroneous to permit the prosecution to deny that fact for the sake of showing motive and design.

Granting, however, for the immediate purposes of the argument, that perjury in respect of the character of the lands might be competent upon the point of intent, the Government could not show that the lands were not subject to entry without being guilty of a fatal variance.

The averment that the lands were timber and stone lands, and subject to entry under the act of 1878, may have been unnecessary to be made, and made under a mistake of fact. It could not, however, be rejected as surplusage, because it is one of that class of descriptive averments which, though gratuitous, must be proved as laid. The government therefore not only was not at liberty to show that the tracts were improperly taken under the timber and stone land act, but was bound to make affirmative proof that they were subject to entry under that act.

If the evidence offered to show that the tracts in question were not timber land be held competent on the question of motive and intent, it negatives the indictment and so creates a fatal variance. If it be held inadmissible, that ruling leaves the prosecution without any evidence at all upon an averment which they were bound to prove affirmatively, and so makes a fatal deficiency of proof.

In either case the verdict must be pronounced erroneous for want of proper evidence to sustain it.

(3) The School Lands.

Evidence of supposed unlawful conduct of two of the defendants in respect of the purchase of some school land from the State of Oregon was erroneously admitted.

This evidence was admitted only as against Williamson and Gesner, it being concededly inapplicable to Biggs, who had no concern in the transactions shown.

The general tendency of this proof is to show that Williamson and Gesner formed a distinct, collateral, and independent conspiracy for the purpose of acquiring from the State of Oregon lands not mentioned in the indictment or included in the conspiracy with which the three defendants were charged.

The Government gave, over exception of defendants, evidence tending to prove that in June, 1902, Dr. Gesner asked one Perry to make application to the State of Oregon for some school land of the State, and said that there would be $50 in it for him. It does not appear that Perry acted at all upon the request (Rec., 627, 628).

It was also shown that about the same time Gesner's sister, Mrs. Gerowe, bought a tract of school land from the State. The correspondence with the State land office was conducted by Gesner for his sister (Rec., 620), and the deed of the State issued to Williamson, Wakefield and Gesner (Rec., 673).

Mrs. Swearingen was permitted to testify that Gesner requested her to buy a tract of State school land and agreed to pay her for doing so. Gesner advanced the purchase money, and, after the issue of deed to Mrs. Swearingen (Rec., 673) took a deed from her, for which he gave her $25 (Rec., 632).

To the proof of these facts defendants reserved exceptions.

The theory upon which this evidence was admitted was that, since the transactions were assumed to be unlawful, they indicated "a pre-existing design, plan or scheme on the part of the defendants Van Gesner and Williamson, as bearing upon the question of motive in the doing of the particular acts charged in the indictment" (Rec., 694).

Passing for the present the competency of this evidence upon the question of motive, it will be observed that the court evidently assumed that the jury must find the facts to be fully proved and then told them that those facts show "the acquisition of lands in an unlawful manner" (Rec., 694).

The evidence of Perry did not show the acquisition of lands in any manner, whether lawful or unlawful. The evidence regarding the purchase of Mrs. Gerowe is so vague that from it no inference can be drawn as to the propriety or impropriety of the transaction. That Mrs. Gerowe should employ the good offices of her brother in a business matter raises no suspicion as to the lawfulness of the enterprise or of the manner in which it was conducted. The fact that the title, based upon Mrs. Gerowe's application, was issued to Gesner does not suggest any irregularity, since the deed emanated from the State land office and was presumably in pursuance of an assignment which was regarded as legitimate by the officers of the State. It can not be said that either of these transactions warrants any inference at all as to an unlawful design on the part of the defendants or of either of them.

Mrs. Swearingen swore to her application before the county clerk, who was fully aware of her arrangement with

Gesner, and agreed with her in her understanding that the transaction was entirely proper under the law of the State (Rec., 631). Whether or not it was so in point of strict law, it is manifest that none of the parties concerned dreamed that it was not, or saw any occasion for doubt or concealment in the premises.

In order to make this evidence competent for the purpose designated by the court, the jury must have believed that the three purchases of school land were made in violation of the law of the State. They could not find any such fact in the Perry matter, because there was no purchase; and they could not find anything unlawful in the Gerowe case, because there was no evidence of any irregularity in that. In the case of Mrs. Swearingen, if they believed her testimony and disbelieved that of Gesner, and if they accepted the view of State law as that was suggested by the court, they could still find no conscious or intentional violation of law, no fraudulent purpose, and therefore no perjury on the part of Mrs. Swearingen or of subornation on that of Dr. Gesner.

But to put these cases to the jury as they were put, assuming that they must find in each case the facts which made it unlawful, and informing them that such facts indicated a wicked design on the part of the defendants, was clearly erroneous and palpably prejudicial. The effect of this proof and this instruction was that the assumed irregularities in the three matters of the State land would warrant the jury in inferring that the defendants had conspired to defraud the United States of its lands by bribing applicants to commit perjury.

(4) Collateral Offenses as Bearing Upon Intent, Motive, etc.

The three classes of evidence last considered were admitted as bearing upon matters vaguely stated as questions of intent, motive, and pre-existing design, plan or scheme.

Upon this ground must be justified, if justified at all, the action of the court in permitting the defendants to be shown guilty of these three offenses, not suggested in the indictment, and all distinct from, and independent of, the offense charged:

(1) The subornation of perjury in the final proofs;

(2) The subornation of perjury by the applicants in respect of the timbered character of the lands; and,

(3) The commission of perjury by Williamson in the purchase of a tract of public land, and the subornation of perjury by Gesner in the purchase of a tract of State school land.

Unless every one of these alleged facts is relevant to the charge of conspiring, and is competent to make more probable the intention to procure perjury in the transaction stated in the indictment, then the defendants were substantially prejudiced by proof of those facts, and the judgment must be reversed. And it is clear that no one of these facts is, intrinsically, of any probative value with respect to the question of conspiracy or fraudulent purpose in the particular matter in which perjury is charged.

The statements made at the time of making final proof, and the purposes of the applicants at that time, can not bear upon the subornation of perjury, because at that stage agreements for alienation of the lands were not unlawful, and no perjury was possible in regard to the matter assigned in the indictment.

The transactions involving the purchase of Oregon school lands could not bear upon the question of perjury, since, in the only case of that kind in which any falsehood is attempted to be shown, it appears that none of the parties concerned had any intention or consciousness of committing perjury or of otherwise violating any law.

If the applicants swore falsely as to the character of the lands mentioned in the indictment, and the defendants swore falsely as to the character of lands not mentioned in the

indictment, those facts, if legitimately proven, might go to the credit of the witnesses, but it would not tend to prove that those witnesses were suborned by the defendants to commit perjury in a third transaction, and in regard to another subject.

This was not a case in which it was necessary, as an incident of proving the offense charged, to give evidence of other offenses which were inseparably interwoven with the substance of the specific charge. If evidence is material to the transaction stated in the indictment, it is no objection to such evidence that it tends also to prove the commission of some other offense. But in such a case care must be taken to see that the defendant is tried only for the act with which he is charged, and is not prejudiced by the incidental proof of other wrongdoing; as where, on a charge of arson, it appeared that the accused had fired a block of five connected buildings:

Regina *vs.* Trueman, 8 Car. & P., 727.
Pointer *vs.* U. S., 151 U. S., 396.

In this case the alleged misconduct of the defendants in matters outside the scope of the indictment was not at all involved in the proof of the transactions charged, but was deliberately and purposely drawn in for the sake of strengthening the case of the Government. And the jury were told that the motives, designs, and intent of the defendants, assumed to have been shown in collateral transactions, might be regarded as material as bearing upon their motives, intent, and designs in the specific case on trial.

This obviously and necessarily was an instruction to the jury that, if it appeared that the defendants had committed or procured perjury in the final proofs, or in respect of the character of the lands, or in other purchases of other lands, the logical and proper inference was that they had acted, in the transaction charged, from like corrupt motives, with like fraudulent purpose, and upon a like criminal plan.

This is manifestly but another way of telling the jury that they ought to convict if they found that the defendants had displayed a criminal or immoral disposition in cases not on trial. The underlying thought is once a perjurer always a perjurer. The admission of this evidence of unlawful acts in other transactions, and the statement to the jury of the ground upon which it was admitted, is nothing more or less than an assertion that evidence of the defendant's bad character and criminal conduct in past transactions will legitimately warrant an inference of his guilt in that with which he stands charged.

That evidence of the defendant's criminal conduct and guilty purpose in past transactions is, in a certain class of cases and under particular circumstances, competent to elucidate his motive or intent in the present, no one pretends to deny. But such cases are exceptional; and the general rule is that such evidence of antecedent or collateral criminality is incompetent, because misleading, fallacious, and in the highest degree prejudicial to the accused. If, therefore, the proof in question is to be justified, it must be shown to be within some one of the exceptions to the rule by reason of its exceptional character or the exceptional nature and posture of the present case.

The grounds which will warrant proof of defendant's wrongdoing in matters collateral to the charge are these: (1) Motive, (2) Intent, (3) Possibility of Mistake or Accident, (4) Common Plan or Scheme, and (5) Identity. In this case there is no room for considering this evidence with reference to any question of identity. An examination of the evidence with reference to the character of the case will show that there was, on other grounds, no occasion or justification for the proof of alleged offenses extraneous to the indictment.

On the contrary, it will appear that it did not, and could not, bear upon any issue in the case, but was relevant to nothing else than the moral character of the defendants.

Every argument which seeks to refer this evidence to any of the exceptional grounds will be found, in its ultimate analysis, reduced simply to this: that the demonstrated criminal conduct and fraudulent disposition of the defendants in other affairs creates a probability that they were actuated by like motives and practiced like guilty methods in the affair for which they are tried.

(1) The only motive which evidence of these collateral offenses could tend to establish would be a desire to acquire lands. A disposition to acquire property is an elemental characteristic of all human nature, and a desire to obtain valuable land may be presumed with reference to every individual of the race. In this case the defendants—that is to say, Gesner and Williamson—frankly avowed, not only an acquisitive disposition in general, but a special reason or motive for wishing to obtain additional land. There was, therefore, no reason on this account for showing any extraneous incriminatory facts.

A desire or motive, moreover, to obtain lands would not at all tend to establish the ultimate fact here necessary to be proved—t[illegible]ctual use of criminal means to effect the desire of the defendants. The universal acquisitiveness of the human race does not affect all or any members of the race with any presumptive guilt, or warrant the inference that every or any person is necessarily disposed to acquire property by dishonest and unlawful methods. The fact that every one wishes to become wealthy does not imply that every one is likely to commit larceny or burglary. Neither does the acknowledged motive of the defendants here tend to prove that they were prepared to accomplish their desire for lands by conspiracy and perjury.

The only way in which this supposed proof of other unlawful acts can bear upon those charged in the indictment is by establishing in the other transactions the use of unlawful means and the existence of a criminal disposition. But this

is not relevant to the matter of motive, but simply and solely to the moral character of the defendants. From the fact that the defendants practiced fraud and perjury in procuring one or two classes of lands, it is natural to argue that they would be likely to employ like methods in the procurement of the lands specified in the indictment.

A man who is shown to have resorted to crime in one transaction may be more readily supposed to be inclined and prepared to commit the same crime in another transaction. This is no more than the instinctive logic of the human mind, that one who is shown to have been guilty of one or more offenses is probably guilty of that with which he is charged. And this is the identical vicious method of reasoning against which it is the policy of the law to protect persons charged with crime, and against which is especially directed the rule of evidence which excludes proof of criminal acts not stated in the indictment.

(2) Combination and common purpose were not in the least proven by this evidence of wrongdoing in matters collateral to the charge. If it were shown that Williamson obtained a tract from the United States by perjury, that Gesner obtained a tract of State land by suborning a perjury, and that Biggs obtained no land at all, these facts would not tend to establish the fact that these three persons had combined to defraud the United States of other lands. All that could possibly be inferred from such a state of facts would be that Williamson and Gesner were likely to be guilty of some moral dereliction in case they should be united in some common purpose.

Men who are addicted to immoral methods are no more likely to combine or to unite in a common purpose than are men of unimpeachable integrity. To show that Williamson and Gesner were capable of separate crimes does not make it at all probable that they formed a joint purpose to acquire public lands. But proof of immoral methods employed by each in other matters might easily lead a jury to believe that

any common enterprise in which they were interested would be probably unlawful in its purpose, or in its execution, or in both.

It being proved by other evidence that Williamson and Gesner did in fact unite to obtain some public lands, and were actuated by that common purpose, a natural presumption would arise that such union and its object were criminal because of the demonstrated criminality of the parties in their individual transactions and methods. But this, it is clear, is not an inference as to the fact of combination or community of purpose, those facts being otherwise established before any presumption at all can arise; it is purely an inference as to the criminality of the common purpose, which inference is deduced from the general evil disposition evinced by the parties in their other business. Argument on this line comes, therefore, to the proposition that an evil intent in the particular transaction may be inferred from bad conduct on other occasions. In other words, the moral character of the accused may be shown to create a probability of his guilt.

(3) "A pre-existing design, plan, or scheme on the part of the defendants" is stated by the court as the fact in issue upon which their unlawful conduct in collateral matters was supposed to bear (Rec., 694).

The acquisition of other lands by the defendants, in other ways and from other sources, would doubtless manifest a desire on the part of both to acquire lands. It might also evince the existence of a design, plan, or scheme on the part of either or both to attain that object. Accordingly, if it were a fact in issue, or if it were material to the guilt of the defendants, it would be quite competent to show that they had acquired other lands.

The fact, however, was not disputed that Williamson and Gesner did desire to obtain lands; nor was it denied that they had sought in various ways to acquire divers tracts.

To that extent a design, plan, or scheme was admitted, or at least not denied, and no purpose was attained, in respect of that fact, by proving that they had resorted to unlawful methods in the execution of their common design.

But the existence of such a design in regard to other lands, and the pursuit of a common scheme, were plainly immaterial to the question of defendants' guilt. It was not criminal to desire lands, or to form a design to get them, or to unite in a common plan for that purpose, or to prosecute by joint effort a scheme to that end. The use by the court of such words as "design" and "scheme" was admirably calculated to convey to the jury a suggestion of impropriety in the facts assumed to have been proved. But neither a design nor a plan nor a scheme is in itself immoral, nor does it become so because it is addressed to the purchase of public lands. So long as the jury inferred from the purchase of other lands no more than a general design or a particular scheme on the part of the defendants to get as much land as was possible, proof of that fact was utterly irrelevant to the issue and wholly inadequate to the exigencies of the prosecution.

The design or scheme of the defendants could be made available as evidence of their guilt only by showing that it was an unlawful scheme and a design that included the employment of criminal methods. Unless the plan imputed to them could be shown to embrace dishonest elements, the supposed concert of action was innocent and of no consequence either to the prosecution or the defense. The proof of the methods by which other lands were acquired was given, therefore, not for the purpose of showing a general scheme of operation, but for the sake, solely and merely, of demonstrating the supposed dishonest elements of that scheme. That such was the single object of this proof appears upon reflecting that the defendants' design to buy lands, and their community of purpose, might have been just as clearly and more effectively shown by offering their

patents and title deeds to prove that they did in fact buy the lands.

This evidence was, therefore, of no value for any purpose except to give a criminal complexion to the transactions proved. And to what end was it useful to affect those transactions with a criminal character? Obviously only for the sake of transferring that character to the transactions which were charged in the indictment. If it could be shown that Gesner suborned perjury in a purchase of State land, and Williamson committed perjury in a purchase from the United States, and both procured the applicants in the present transactions to commit a perjury not assigned in the indictment, the jury would the more readily infer that the defendants had suborned the specific perjury for which they were on trial.

That such a method of reasoning from offenses not charged to the likelihood of guilt in respect of the particular offense charged is natural and, in a sense, logical, is clear enough. It is equally clear that this reasoning does not lead back to the existence of a common design, plan, or scheme, even were such fact disputed or material. The fact which is established is not any concert of action or community of purpose, but solely the probability of dishonesty in the specific matter stated in the indictment. And this probability is not at all an inference from the assumed and conceded fact of combined action and concerted scheme, but an inference altogether from the demonstrated bad character and criminal disposition evinced by the defendants in other matters. And because this mode of inferring guilt in one transaction from proof of guilt in other transactions is so natural and so logical is the precise reason why the law excludes evidence of criminal conduct not laid in the indictment.

(4) The intent of the defendants is another fact upon which the proof of offenses extrinsic to the indictment was supposed to bear (Rec., 81, 294).

The manner in which evidence of collateral wrongdoing was assumed to demonstrate a criminal intent in respect of the offense on trial is but obscurely stated by counsel for the Government on page 81, and not at all by the court on page 294.

The word "intent," as used in criminal law, has three meanings, or at any rate three different applications.

A general criminal intent, which is a necessary element of every crime, is an intent to do wrong, or at least to do a forbidden thing. Such intent is, in general, unnecessary to be proved, because it is inferred from the mere doing of an unlawful act. In no case is it proved by inference from proof of other wrongdoing.

A specific criminal intent, such as the *animus furandi* in larceny, or the intent to commit a felony in burglary, is essential in some crimes, and is usually inferred from the circumstances of the particular case. It is never proved by evidence of particular wrongdoing in other cases.

In a third sense, the intent with which an act is done relates to the offender's understanding of the nature of the act, and the question whether or not he knew it to be an act such as the law forbids. In this sense the word is applicable only to a class of cases in which the act of the accused is guilty or innocent accordingly as it was or was not done with knowledge of matters of fact material to constitute guilt. Examples of this class are homicide in supposed self-defense under a mistaken belief of personal danger, the uttering of counterfeits, the receiving of stolen goods, the obtaining of money by representations alleged to be false, and so forth.

In these cases it is essential to the guilt of the offender that he should have known the facts to be as they were and that his act was what it really was—that he should have known that the homicide was committed without actual necessity, that the bills uttered were counterfeit, that the goods were stolen, and that his pretenses were false.

In this sense the criminal intent is synonymous with guilty knowledge, and is exclusive of accident or a mistake

of facts. And it is, so far as the researches of counsel have extended, only with reference to this kind of intent that evidence of the defendant's conduct in matters outside the indictment is relevant or competent. When, and only when, the acts of the defendant are of dubious criminality, because they are such as might have been done innocently, then evidence of his other acts is admissible to exclude the possibility of accident or mistake or other facts which are consistent with innocence.

Upon a charge of uttering a counterfeit, proof that the accused passed the bill and that the bill was counterfeit leaves the transaction of doubtful aspect. The facts proven are, of themselves, equally consistent with a criminal purpose or an innocent mistake. To clear up the dubious character of the act and to affix to it the necessary guilty complexion, it is competent to show other acts of like nature done with such frequency and under such circumstances as exclude the possibility of ignorance or accident. So, it is believed, in every other case in which criminal conduct other than that charged in the indictment can be proved, it is solely upon the ground that the act proved is of ambiguous aspect, and solely for the sake of resolving the ambiguity by fixing upon the offender such guilty knowledge as is inconsistent with his innocence in the particular transaction.

Cases in which fraud is a material element, and decisions which profess to enlarge the range of evidence as to fraudulent intent, will be found to fall within the same principle. In all such instances the transaction in question is one which may have been done fraudulently or may have been done in good faith, and whether it was done in the one way or the other depends upon the defendant's knowledge of the facts and the possibility of accident or mistake. In order to fix him with guilty knowledge and fraudulent intent arising out of such knowledge, the latitude of proof extends to similar transactions involving like knowledge and the same intent.

Wood *vs.* United States, 16 Pet., 342, was a charge of fraudulent undervaluation in a particular invoice; and twenty-nine similar invoices showing like undervaluations by the same importer were held competent as excluding his claim of innocent mistake.

Castle *vs.* Bullard, 23 How., 172, involved the charge that a firm of brokers had sold the plaintiff's goods to a person known to be insolvent—a transaction which was, on its face, susceptible of either a fraudulent or an innocent interpretation. Proof that defendants had made similar sales under circumstances excluding the possibility of accident or mistake was held competent to clear up the doubt arising from the inconclusive aspect of the particular matter.

Lincoln *vs.* Claflin, 7 Wall., 132, was predicated upon a purchase of goods alleged to have been made with intent to defraud. On the face of the case made by the evidence, the purchase was equally consistent with fraud or good faith. Admissions of the defendants tending to show that their intentions had been fraudulent in other cases were held competent to determine the character of their motives in this.

Insurance Co. *vs.* Armstrong, 117 U. S., 591, was a case in which one Hunter had obtained insurance upon the life of another, a thing which might have been done either legitimately or fraudulently. The company, in order to fix the character of the transaction as fraudulent, was allowed to show that Hunter had obtained other policies on the life of the same person and had killed the insured.

So, it is believed, in all other well-considered cases, evidence of facts not directly involved in the transaction to be tried is held admissible only where the transaction is of doubtful complexion, and only for the sake of resolving an ambiguity appearing on the face of the transaction itself.

Mr. Justice Story, in a case cited with approval in Life Insurance Co. *vs.* Armstrong, *supra,* thus states the rule and its limitations:

> "In short, wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a

case, these collateral facts, tending to establish such intent or knowledge, are proper evidence. In many cases of fraud it would be impossible otherwise satisfactorily to establish the true nature and character of the act."

Bottomley *vs.* U. S., 1 Story, 135.

In People *vs.* Molineux, 168 N. Y., 297, the doctrine on this subject is thus stated by Werner, J.:

"In the popular mind, intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. When a crime is clearly proven to have been committed by a person charged therewith, the question of motive may be of little or no importance. But criminal intent is always essential to the commission of crime.

"There are cases in which the intent may be inferred from the nature of the act. There are others where willful intent or guilty knowledge must be proved before a conviction can be had. Familiar illustrations of the latter rule are to be found in cases of passing counterfeit money, forgery, receiving stolen property, and obtaining money under false pretenses. An innocent man may, in a single instance, pass a counterfeit coin or bill. Therefore intent is of the essence of the crime, and previous offenses of a similar character by the same person may be proved to show intent. So in a case where the defendant is charged with having received stolen property, guilty knowledge is the gravamen of the offense, and *scienter* may be proved by other previous similar acts. * * *

"It will be seen that the crimes referred to under this head constitute distinct classes, in which the intent is not to be inferred from the commission of the act, and in which proof of intent is often unobtainable except by evidence of successive repetitions of the act."

Perjury and subornation of perjury are undoubtedly crimes in which an essential element is this particular criminal intent, meaning thereby the intention to do a criminal act with guilty knowledge of the facts which make it criminal. It has already, in the course of this argument, been pointed out that false swearing, to constitute perjury, must be done willfully and with knowledge that the matter sworn to is untrue; and in subornation, a like guilty knowledge must be shown. Because in this case the Government omitted to show that the defendants knew the falsity of the alleged false statements, and the court refused to advise the jury that their ignorance on that point would be a defense, it will be submitted that the judgment was erroneous.

The only criminal intent in issue on a charge of perjury is guilty knowledge. When it is proved that the accused has sworn to a statement which is untrue in fact, the situation is still ambiguous. Such an untrue statement may have been made in good faith, under a mistake of fact, or through some other accident. To affix to the testimony the quality of guilt must be added the element of false intent. Inasmuch as proof of the swearing is equally consistent with guilt or innocence, it must be shown, to resolve the ambiguity, that the accused knew his statements to be untrue. In this way evidence of his other statements concerning the same facts, or evidence showing his acquaintance with the same facts, is competent to affect him with guilty knowledge, and thereby establish his criminal intent.

But all such evidence must necessarily relate to the very facts involved in the alleged perjurous testimony. The guilty knowledge to be shown is knowledge of falsehood in the defendant's statement, and the criminal intent to be established is an intent to swear falsely in respect of the facts to which the accused has testified. To this end it would be immaterial, and plainly incompetent, to prove that the accused, in other cases, had committed perjury in respect of other facts. That would be to assume that a man once guilty of perjury is guilty again whenever anybody sees

fit to indict him. That would be, not proving a particular criminal intent material to the present charge, but a general criminal disposition from which such particular intent might be inferred for the purposes of the case on trial. Accordingly, all the authorities agree that proof of falsehood in one case is not competent on a charge of perjury in another, any more than one larceny can be proved by proof of another.

In this case the evidence of the perjuries alleged to have been committed or procured by the defendants in other cases did not at all bear upon their guilty knowledge in the present. Neither this proof nor any other purported to show that they knew of the making of the supposedly illicit contracts, or that they knew or believed that the act of 1878 made such contracts illicit, nor did this evidence tend to disprove the good faith in the premises asserted by the defendants, or to exclude the possibility of accident or mistake on their part or the part of the persons alleged to have committed the perjury assigned in the indictment.

Indeed, this proof did not even purport to show that, in the collateral transactions themselves to which it related, the defendants had guilty knowledge or had acted with fraudulent intent. Although, as has been pointed out, no perjury was possible in the final proofs, and although in the Swearingen case everybody concerned appears to have acted in entire good faith, it seems to have been tacitly taken for granted that the defendants knew that these transactions were unlawful and were consciously guilty of fraud and criminal procurement.

But assuming, as did the court and the district attorney and the jury, that all these cases evidenced on the part of the defendants a criminal intent and a guilty knowledge in those cases, how can that fact tend to show the like intent and knowledge in the present case? The one fact material to the issue was such knowledge on the part of the accused, in relation to the facts charged in the indictment, as would demonstrate an intent to procure perjury, knowing it to be

perjury. To establish this, any evidence would be pertinent which tended to prove or to disprove the making of the contracts alleged, to confirm or rebut the presumption of illegality in such contracts, or to charge the defendants with such knowledge of the facts or of the law as would exclude the possibility of accident or of ignorance concerning the matters which were the subjects of the statements supposed to be false. But to this end evidence of falsehood or fraudulent practice in respect to other facts and in other transactions would be not at all probative, except, of course, in the way that all proof of bad moral character creates a probability of bad conduct.

To show that Williamson committed perjury in the purchase of one tract, and that Gesner suborned perjury in the purchase of another, would not tend to prove that they had made illicit contracts, knowing those contracts to be illicit. To show that these defendants procured or permitted the applicants to swear falsely as to the character of the lands, upon which perjury was not assigned, was no proof that anybody intended to commit perjury in respect of the contracts, upon which perjury was assigned.

To show that the defendants expected the applicants, at final proof, to deny the existence of the contracts assumed to be unlawful, did not charge any of the parties concerned with guilty knowledge that alienation at that stage was unlawful. In all these collateral matters the defendants may have been as guilty as they were assumed to be, but proof of that fact did not at all establish any element of guilt in the present transaction.

Nor, in truth, was this evidence offered for any such purpose. No one supposes that it has any actual bearing upon the criminal intent of the defendants in the matters stated in the indictment, meaning by criminal intent what has been defined as the only proper sense of the phrase in such use. It will not be contended that proof of the defendants' guilt on other occasions tends to convict them of guilty

knowledge on the present occasion. This evidence was not intended to relieve the transactions charged of any dubious aspect by demonstrating any necessary criminality in the acts proved, or by rebutting any presumption of innocence, ignorance, or error concerning the true nature of those acts.

The manifest purpose of this proof was to establish against the defendants a general criminal intent, and from that to infer the necessary fraudulent intent in the particular case. In no other possible sense of the word can evidence of past falsehoods tend to prove a false intent in the perjury presently alleged. To show that a man has committed perjury on a former occasion does not, in contemplation of law, prove him guilty of the perjury with which he stands charged. It is relevant only as all other evidence of past misconduct and evil purpose is relevant, and that is to the fact of the defendant's moral character.

Such proof establishes nothing that grows out of the issue made, but it does tend to demonstrate the immoral habit and the criminal predisposition of the defendant. And it is persuasive in only one way, and in that way immeasurably persuasive, to create a probability that the defendant is guilty because in another transaction he is found to have been guilty of the same crime.

A professional assassin is likely to be guilty of murder. A common thief is likely to commit larceny. An habitual perjurer is apt to commit or procure perjury. Once show that the accused has done any of these things, and is not that fact probative of his guilt in respect of the cognate offense with which he stands charged?

To this complexion the argument, in its every aspect, must come at last. Whether the evidence of the defendants' misconduct in collateral matters be regarded as addressed to the fact of motive, of combination, of design, or of intent, it tends to prove each and all of these facts in but one way. It demonstrates, if believed, that the defendants were men of bad character, insensible to moral obligations, and disposed

and prepared to gain their ends by unlawful means. Such men, it is natural and logical to infer, would be actuated by corrupt motives, would form criminal combinations, would entertain vicious designs, and would execute illicit schemes with evil intent. If it can be established that such is the moral character of the defendants, and such has been their manner of life, the proof of these facts tends powerfully to create a probability that they are guilty of whatever happens to be charged against them.

This, and no other, is the theory upon which the defendants were allowed to be taxed with misdeeds not hinted at in the present indictment, and called upon to defend against imputations altogether foreign to the charge. Counsel may fence as they will with the difficulty, and spin subtle refinements for the sake of evading it; they may seek to conceal the stone of scandal and the rock of offense with such cloudy words as motive, design, combination, and intent. But the fact remains, and in the last analysis cannot be escaped, that this objectionable testimony proves all these things only as all evidence of bad character and previous misconduct proves guilt in the particular instance alleged in the indictment. And it is precisely for the reason that such evidence operates so forcibly and so fallaciously in that way that the law excludes it, and that its admission in the present case constitutes reversible error.

In People *vs.* Molineux, 168 N. Y., 297, the indictment charged the defendant with causing the death of one Mrs. Adams by means of poison sent to her in the guise of a harmless drug. The State was allowed to show that two months before the death of Mrs. Adams one Barnet had been poisoned in much the same way and under circumstances which indicated that the defendant had a strong motive to desire his death. In reversing a judgment of conviction, for the error in admitting evidence connecting the defendant with the murder of Barnet, it was said by Judge O'Brien:

> "In any inquiry concerning the author of any great crime, where the evidence is purely circum-

stantial, the human mind instinctively adopts processes, in arriving at results, which are not sanctioned by the rules of evidence. The hardened and habitual criminal is more likely to be suspected than one who has never committed a crime before. If the party suspected committed a similar crime before by the same or similar means, or a series of such crimes, proof of these facts goes far to establish his guilt in the popular mind of the offense charged and for which he is on trial.

"And yet nothing is better established than the rule that the vicious character of a person on trial for a specific offense cannot be shown, unless he himself makes his character or the events of his life a subject of inquiry by becoming a witness in the case. No matter how notorious a criminal the party on trial may be, neither his general reputation nor other specific offenses can legally be proven against him as evidence of his guilt of the offense charged.

"That such proof is persuasive and has great influence when introduced, upon courts and juries, cannot be doubted; but the law does not permit it to be given upon the trial of an issue concerning the guilt or innocence of the party on trial for a specific offense. The reason is that such proof does not bear upon the issue in the case, and hence it is misleading, since it does not follow that a party who has committed one crime, or many, is guilty of some other crime for which he is on trial.

"It is said that evidence culminating in Barnet's death tends to identify the defendant as the author of the death of Mrs. Adams.

"But that is only another way of asserting the general proposition that the commission by the defendant of one crime tends to prove that he committed another crime, and no matter in what form, or how often, that proposition is asserted, or how persuasive or plausible it may appear, it is erroneous and misleading, since it violates a salutary principle of the law of evidence, which should be applied in all cases without regard to the question of actual guilt or innocence. * * *

"I think the evidence relating to Barnet's sickness and death would not for a moment be considered

competent but for the fact that it creates a strong impression upon the mind that the author of his death must also be the author of Mrs. Adams' death, since in both cases death was caused by similar means.

"We may attempt to deceive ourselves with words and phrases by arguing that it is admissible to prove intent, or identity, or the absence of mistake, or something else in order to bring the case within some exception to the general rule; but what is in the mind all the time is the thought, so difficult to suppress, that the vicious and criminal agency that caused the death of Barnet also caused the death of Mrs. Adams."

People *vs.* Sharp, 107 N. Y., 427, was an indictment charging the defendant with bribery of a member of the common council of the city of New York to influence him to vote in favor of a railway franchise in which the defendant was interested. The trial court permitted the prosecution to prove that shortly before the date of the alleged offense the defendant had offered to pay a large sum of money to the engrossing clerk of the Assembly if the latter would alter the text of a legislative act so as to make it effect a grant of the desired franchise. The conviction was reversed on the ground that proof of this fact was incompetent and prejudicial; and it was said by Mr. Justice Peckham:

"It is a very general and extremely broad, and, I think, a dangerous, ground upon which to claim the admissibility of evidence of this character to say that it tends to show that the prisoner was desirous of obtaining a railroad on Broadway and that he was willing to commit a crime for the purpose of securing his object. It seems to me this is nothing more than an attempt to show that the prisoner was capable of committing the crime alleged in the indictment because he had been willing to commit a similar crime long before, at another place, and for the purpose of accomplishing the commission of another act by a different person. To adopt so broad a ground for the purpose of letting in evidence of the commission of another crime is, I think, of a very dangerous tendency.

> It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tends to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence. I do not think that evidence of the kind in question, and in such a case as is here presented, legitimately tends to enlighten a jury upon the subject of the intent with which money was paid many months thereafter to another person, at a different place, and to accomplish the commission of another act. It throws light upon that intent only as it tends to show a moral capacity to commit a crime. It gives, under the circumstances, entirely too wide an opportunity for the conviction of an accused person by prejudice, instead of by evidence showing the actual commission of the crime for which the defendant is on trial."

(5) Good Faith and Guilty Knowledge.

In refusing to submit to the jury the good faith of the defendants and their belief as to the lawfulness of their conduct the trial court committed a substantial and clearly reversible error (Rec., 697, 698).

The subornation of perjury assigned as intended was in procuring the applicants to swear that they had not made contracts whereby their proposed entries should inure to the benefit of other persons, the fact being, as is alleged, that the applicants had made arrangements with Gesner which amounted to such contracts as are forbidden by section 2 of the act of 1878.

Whether or not such arrangements amounted to such contracts involved two questions—(1) as to the legal effect of the negotiations to create obligations, and (2) as to the legitimacy of such arrangements with reference to the act of 1878. Both of these were questions of mixed law and fact, if not of pure law, requiring for their true answers an

understanding of the nature of contracts and a construction of the statute.

In swearing that they had not made such contracts as are inhibited by the act of 1878, the applicants swore to their conclusions respecting the legal nature and effect of their previous negotiations with Gesner. The good faith, first, of the applicants in so swearing, and, second, of the defendants in procuring them so to swear, were therefore in the highest degree material upon the question of perjury and subornation. Unless the applicants, on the one hand, and the defendants, on the other, knew that the arrangements existing between them constituted such contracts as are forbidden by the act of 1878, it cannot be said that the applicants swore to their statements not believing them to be true.

(1) *As Bearing upon Perjury and Subornation.*

In order to constitute subornation of perjury it is, upon authorities already cited, necessary that three facts shall appear:

(1) That the suborners believed the statements procured to be untrue;

(2) That the persons suborned believed that they were swearing falsely; and,

(3) That the suborners knew that the persons suborned did not believe in the truth of the statements made by them.

It results that it is incumbent upon the Government to establish these three matters of guilty knowledge. And of course evidence tending to negative such knowledge was competent on the part of the defendants; and the jury should have been distinctly told that in order to convict they must find that both the defendants and the applicants knew that the statements were false under the act of 1878, as they knew and understood that act.

In all this testimony, covering more than 600 pages of printed record, it does not appear that the Government

offered any evidence whatever to show that either the defendants or the applicants knew or believed that the alleged contracts were unlawful, or that any of them understood the act of 1878 to forbid such arrangements as were made. On the other hand, there was abundant evidence, much of it coming from witnesses for the Government, tending strongly to establish the entire good faith of all the persons concerned in the transactions proved, and their sincere belief, based, in some cases, on the advice of counsel, that those transactions were perfectly legitimate.

Gesner, finding himself in need of land for range purposes, consulted Biggs as to how it could properly be obtained. Biggs was a reputable attorney engaged in active practice at Prineville (Rec., 400), and nothing was offered in this case tending to cast any doubt upon his integrity, competency, or honesty in the giving of his advice in the matter. Biggs gave it as his opinion that Gesner might advance money to intending entrymen, and secure the loans by notes and mortgages, and that he was also at liberty to say to such persons that he was willing to pay a certain price for the titles. Biggs said, further, that it would be unlawful to attempt to make any contracts for the purchase of the lands to be entered (Rec., 400).

In all of this counsel Biggs was unquestionably correct, and the opinion given by him accords exactly with that of this court in United States *vs.* Budd, 144 U. S. 154, to say nothing of other judicial declarations to the same effect.

At any rate, Dr. Gesner accepted the advice of his attorney as safe, and proceeded to act upon it, having about the same time consulted another attorney, Barnes, who agreed with Biggs (Rec., 401). It was, as he swore, his intention to keep within the law, and he believed that he was doing so at all times, and he understood that the whole transaction was perfectly lawful and honest (Rec., 460).

Williamson was absent from the neighborhood, being resident at The Dalles, and engaged in political affairs (Rec.,

469, 471) at the time when Gesner conceived the idea of securing additional land, and was carrying on the negotiations to that end. He knew that Gesner was making loans upon timber lands, but did not know of any suggestions in regard to the purchase of such lands (Rec., 403, 475), and no information of that kind was ever given him.

There was no suggestion that Biggs had any interest in the success of the supposed conspiracy, or that he did anything in furtherance of it beyond acting as commissioner in taking the preliminary statements and final proofs of the applicants, and giving advice on points of law to the other defendants and to some of the applicants who consulted him. In forming his opinion as to the propriety of the transaction, it appears that he examined the authorities (Rec., 401), and there is nothing to indicate that he did not advise his clients according to his best judgment and his conscience. Indeed, as has been suggested, and as will be submitted at a later stage of this argument, his opinion seems to have been quite correct in point of law, and to have been founded upon the authority of the decided cases.

However that may be, this evidence certainly conduced to show that the defendants acted in the matter in entire good faith and upon an honest opinion as to the meaning of the law. Whether their construction of the statute was sound or unsound, and whether or not, in point of law, the arrangements made by Gesner were permitted by the statute, this testimony was clearly competent to prove that the defendants, or such of them as knew the nature of the transaction, believed and had reason to believe that the transaction was legitimate and that the alleged understanding in regard to the purchase of the lands was not such a contract as was forbidden by the act of 1878.

With respect to the good faith of the persons alleged to have been suborned, it appears affirmatively that some of them had no doubt at all as to the propriety of what they did, and that such of them as felt any misgivings on the

subject took the advice of counsel and were assured that they would not violate any law in making entries with the intention of selling the land to Gesner.

B. F. Jones reasoned that if he paid $425 for the land and sold it for $500, the difference would be for his benefit, and he was disposed, even when on the stand, to argue to that effect. It was only by the most strenuous leading of the district attorney that he was induced to admit that his original opinion on this point had undergone a change in the intervening three years (Rec., 76). If Mr. Jones had read the opinion of this court in United States *vs.* Budd, *supra*, and had not felt that he was standing in the shadow of the penitentiary because the district attorney differed with this court, he might have insisted to the last upon the correctness of his first understanding of the statute.

Beard "did not think we were doing anything wrong when we signed that" (Rec., 128), meaning the sworn statement, and he supposed that it was not unlawful for a man to borrow money one the land (Rec., 129), in which latter opinion, if not in the former also, he was unquestionably correct.

Watkins took the professional opinion on the question of Biggs, who was not then suspected of complicity in the supposed conspiracy (Rec., 136), and did not believe that he was swearing falsely; and even at the trial he was in doubt as to whether his conduct had been improper (Rec., 157). Indeed, it had not occurred to him that there was any wrong in what he had done until the investigation had begun a few months before the trial, which resulted in this indictment (Rec., 157). In swearing to this final proof, a matter not within the alleged scope of the conspiracy, he had some misgivings in regard to a case where the applicant did not pay with his own money, but considered his own situation unimpeachable (Rec., 158).

Calavan consulted Biggs as to the propriety of swearing that the application was for his own benefit, and was advised that, so long as there was no agreement to sell to Gesner, the

law was not violated, and that if he did sell at a profit of $75 that would be for his own benefit (Rec., 166). With regard to a question on this point asked on final proof, Calavan understood, "the way it was construed to me there, or the way we construed it, rather," that no purchase had been settled upon as the result of previous negotiations (Rec., 168).

Crain also consulted Biggs and was advised that, inasmuch as he, Crain, had had no conversation at all with either Williamson or Gesner, there could not possibly be a contract (Rec., 183, 184), an opinion which, it is submitted, was beyond question correct.

Evans took the advice of Biggs (Rec., 200), and, whether as the result of the consultation or otherwise, he did not regard himself as under obligation to sell to Gesner (Rec., 200).

Hudson seems to have had no doubt as to the propriety of his conduct, and had no purpose of selling to Gesner unless the latter should offer more than anyone else (Rec., 222, 238). The same is true of Feuerhelm (Rec., 256, 258). Mrs. Watkins, so far as appears, had no question in her mind about the correctness of the transaction (Rec., 261, 262).

Ray consulted Biggs, and was told that the proposed transaction was, in contemplation of the law, for his benefit (Rec., 599), and was assured by Gesner that the latter had taken legal advice to the same effect (Rec., 609). Duncan was advised that he could not make a contract, but that an understanding was not unlawful (Rec., 545, 562, 563). Gaylord had no occasion to entertain any doubts or to ask for advice, because he had had no dealings with Gesner, and had no understanding at all regarding the sale of the land (Rec., 650).

There was also evidence, some of it coming from witnesses for the Government, to the effect that Gesner had assured some of the applicants that he had consulted counsel and had been advised that the proposed transactions would be legitimate (Rec., 609).

If Gesner and Biggs, the latter of whom advised several applicants in the same way, believed that the applicants accepted such advice as correct, and acted upon it as sound in point of law, then the defendants would not be guilty of subornation, even though the applicants had discredited the advice and supposed they were swearing falsely.

Upon this evidence, defendants requested the court to charge the jury, in substance, that if the defendants believed that the arrangement in question was within the law, and such as might rightfully be made, and that the applicants might truthfully swear that no contracts had been made, then the verdict should be not guilty, although it should appear that some or all of the persons concerned were mistaken as to the law or the facts (Rec., 697, 698).

To the refusal of this request an exception was reserved.

The court and the district attorney seem to have assumed that the law on the subject of agreements under the act of 1878 was so well known and so clear that everybody must be presumed to know the law and to understand it precisely as they understood it. For this reason it was not considered necessary to prove that the defendants and the applicants knew that the statements were false, or to rebut the evidence showing that those statements were believed to be true. And the jury was not allowed to consider the good faith or the veracious and lawful intent of the defendants in allowing the applicants to swear as to the legal effect of the transactions.

How far an intending entryman under the act of 1878 may go in the way of negotiating for a transfer of his expected title is a matter upon which there has been some difference of judicial and Departmental opinion. The true intent and proper construction of that statute were the subject of debate so late as the year 1892, when this court decided a case in which the Government sought to vacate a patent under this act, on the theory that the applicant had violated the law by making an entry with the purpose of selling the land to another party, who had expressed a willingness to buy it at a certain price. It was not until the decision in that

case that it was settled that an entry made under such circumstances was not forbidden by the act of 1878:

United States *vs.* Budd, 144 U. S., 154.

Without at present insisting that the Budd Case established the innocence of the arrangements shown to exist in the present case, and the truthfulness of the alleged false statements, that decision suffices to show that there might, at all events, be room for an honest difference of opinion as to the lawfulness of the alleged contracts—such a difference as might account for some doubts in the minds of the defendants and the entrymen, and such as might warrant a sincere and conscientious attorney in giving the advice which Biggs gave to the various persons who consulted him.

If the persons concerned accepted in good faith the opinion of Biggs, and if they acted in the sincere belief that the facts existing did not constitute contracts whereby the entries were to inure to the benefit of Gesner, in the statutory sense of that statutory phrase, then they were justified in procuring and in swearing to the statements alleged to be false.

Upon authorities already cited, the false swearing which constitutes perjury must be willful. A *bona fide* belief in the truth of the facts stated excludes the requisite criminal intent. On any matter which involves conclusions of law, the advice of counsel is always relevant to the question of willfulness, and in many cases the fact that such advice was taken and acted upon is "conclusive of innocence."

Com. *vs.* Clark, 157 Pa. St., 257.
Hood *vs.* State, 44 Ala., 81.
State *vs.* McKinney, 42 Iowa, 205.
U. S. *vs.* Stanley, 6 McLean, 409.
U. S. *vs.* Conner, 3 McLean, 573.
2 Bishop, Crim. Law, § 1047.

(2) *As Bearing Upon Conspiracy.*

The good faith of the defendants was especially relevant, and even more material, to the question of their guilt of conspiracy.

The making of the contracts forbidden by the act of 1878 is merely a *malum prohibitum*. Such arrangements are not intrinsically improper, but are, in the absence of express enactment to the contrary, entirely legitimate. Inasmuch as the unlawfulness of such contracts arises only in virtue of the statute, the moral guilt of one who makes an entry under this act, after having agreed to a prohibited contract, depends altogether upon his knowledge of the statutory prohibition and his understanding of the statutory language.

"Moral guilt" is the phrase advisedly used in the foregoing sentence. The defense of ignorance of law or of good faith is, of course, not available to one who is indicted for an unlawful act, whether the act be *malum in se* or merely *malum prohibitum*. But the moral delinquency of the offender, who has done something not wrong in itself, depends upon his knowledge of the law which makes that thing a prohibited thing. In the present case, if the applicants alleged to have been suborned did not know the prohibitory clause of the act of 1878, or, knowing it, did not understand it as the trial court assumed it should be understood, they might be liable for any penalty denounced by the act, but they could not be deemed guilty of anything that is *malum in se*.

So if the defendants did not know that the arrangements shown to have been made were, in legal effect, contracts, and contracts within the prohibition of the act of 1878, they did not contemplate perjury in the statement of the applicants. Though it was admitted that such arrangements were unlawful under that statute, they were not *per se* immoral, and were unlawful only because prohibited. Unless the defendants knew that what was done was within the prohibition of the statute—that is to say, unless they

understood the statute as the trial court did—their combination to effect the entries would not be a conspiracy.

A combination to do or procure something which is morally wrong or known to be prohibited is a conspiracy. A combination to do or procure something merely prohibited is not a conspiracy unless the parties know that it is prohibited. In any case where the charge is of conspiracy to commit an act which is *malum prohibitum*, it may be shown in defense that the defendants did not know of the prohibition, or did not understand that the particular thing done is within the scope and the true construction of the prohibitory statute.

In such a case, therefore, the *bona fide* belief of the parties and the advice of counsel are relevant, and in order to justify a conviction the jury must find that the accused did not act in good faith, but willfully violated the statute.

State *vs.* Flynn, 28 Iowa, 26.

People *vs.* Powell, 63 N. Y., 88, was an indictment for conspiracy charging county commissioners with agreeing to violate a statute which required them to advertise for proposals before purchasing supplies for county institutions. Defendants offered to show that they acted in the honest belief that the law did not require them to advertise, and prayed an instruction to the effect that if the jury found that fact the verdict should be not guilty. The refusal of this instruction was held error, the court making this distinction:

> "Where a man is indicted for doing a prohibited act, he will not be allowed to say that he did not know of the existence of the law he had violated. The offense in cases of acts *mala prohibita* is complete when the act is intentionally done, irrespective of any actual intention to violate the law. In accordance with this general doctrine, it has recently been held in this court, in People *vs.* Gardner, that an honest misconstruction of the law by a public officer, under which he did an act which the court held he

was prohibited from doing, was not an answer to an indictment for doing the prohibited act.

"But to make an agreement between two or more persons to do an act innocent in itself a criminal conspiracy it is not enough that it appears that the act which was the object of the agreement was prohibited. The confederation must be corrupt. The agreement must have been entered into with an evil purpose, as distinguished from a purpose simply to do an act prohibited in ignorance of the prohibition. This is implied in the meaning of the word conspiracy. Mere concert is not conspiracy.

"Persons who agree to do an act innocent in itself, in good faith and without the use of criminal means are not converted into conspirators because it turns out that the contemplated act was prohibited by statute. The actual criminal intention belongs to the definition of the offense, and must be shown to justify a conviction for conspiracy. * * *

"It was open for the jury to find, upon evidence, that no criminal intentions existed, and, if this had been found, to have acquitted the defendants."

(6) The Instructions.

(1) *The Overt Acts and Participation of the Parties.*

Against the objection and over the exception of the defendants, the trial court charged the jury as follows:

> "The offense is sufficiently proved if the jury is satisfied from the evidence, beyond a reasonable doubt, that two or more of the parties charged, in any manner or through any contrivance, positively or tacitly came to a mutual understanding to accomplish an unlawful design, followed by some act done by any one of the parties for the purpose of carrying it into execution" (Rec., 685, 694).

Of this proposition it will be observed:

(1) It permits the jury to convict the defendants without finding that any one of the overt acts charged in the indict-

ment had been done by anybody. In point of fact, it appears from the testimony reported that there was no attempt to prove any of the overt acts alleged, and this omission is, at a later stage of this argument, assigned as a fatal defect in the case of the prosecution. But, whether or not there was any evidence as to any of those acts, this instruction dispenses with the necessity of finding any such act to have been proven. It authorizes and requires the jury to convict if they find "some act done by any one of the parties," even though they find that none of the acts mentioned in the indictment was done by any one of the parties.

The rule is undoubted that at least one overt act must be alleged in the indictment, and that at least one of the acts so alleged must be proven. In this case, under this instruction, the jury were bound to convict if they believed that Gesner made the propositions attributed to him by the witnesses, or that Williamson wrote some numbers in a book, or that Biggs swore the applicants to their written statements, notwithstanding that the particular acts alleged were not attempted or pretended to be proved by any testimony at all.

(2) The instruction directs the jury to convict all of the defendants if satisfied "that two or more of the parties charged" came to an unlawful agreement. The effect is that all three of the defendants must be convicted if any two of them conspired, and the jury could have understood the proposition in no other way. If Gesner and Biggs agreed upon some unlawful design while Williamson was at The Dalles or canvassing the district to secure his election to Congress, still Williamson must be included in the conviction on that proof, because "the offense is sufficiently proved." It will presently be pointed out that there was no serious effort to connect the plaintiff in error with the alleged conspiracy, the evidence to that end being so slight and so thoroughly consistent with his innocence that it could not support a verdict against him. But, in the face of this instruction, the jury had no choice in the matter, with re-

spect to Williamson, if they believed that the other defendants were guilty.

(3) The jury were directed to convict all of the parties if it appeared to them that "two or more of the parties charged" came to an unlawful agreement, and that this agreement was "followed by some act done by any one of the parties for the purpose of carrying it into execution." If two of the parties framed an unlawful design, they would be guilty of nothing unless one of the two did some act in furtherance of that design. If a third party, unaware of the unlawful scheme formulated by the others, should ignorantly, inadvertently or without intention do something which would advance that scheme, neither the third party nor the other two would have committed an offense. But, as the court stated the law to the jury, in such a case all three must be convicted, notwithstanding the incompleteness of the offense on the part of the two agreeing and the entire innocence of the third. The overt act need not be done by one of the "two parties," or of the "said parties;" but if done "by any one of the parties" it charged them all with guilt, although the two parties did not expect or desire the act to be done, and though there was no privity at all between them and the third party.

If the jury believed that Gesner and Biggs had formed a scheme to defraud, but had done and intended to do nothing to put that scheme into effect, and that Williamson unknowingly did something which would advance the unlawful design of the other two, all three were to be found guilty. Since there was no affirmative proof to connect Williamson with the supposed conspiracy, the inclusion of the plaintiff in error in the conviction can be accounted for only by supposing that the jury understood this instruction according to its evident and necessary meaning.

(2) *As to the Evidence Necessary to Convict.*

Error was committed in giving the jury a misleading instruction as to the scope of the conspiracy necessary to be proved, and in refusing instructions prayed by the defense for the purpose of defining the character and extent of such conspiracy.

After defining (Rec., 685) a conspiracy as an unlawful confederacy or combination to effect an unlawful purpose, the court proceeded:

> "A common design is the essence of the crime of conspiracy, and this may be made to appear when the parties steadily pursue the same object, when acting separately or together, by common or different means, all leading to the same unlawful result. When it is proven that they do so act with a common unlawful design, the principle upon which the acts and declarations of one of the conspirators in the prosecution of the enterprise are admitted in evidence against all the persons prosecuted is that by the act of conspiring together the conspirators have jointly assumed as a body the attribute of individuality, so far as regards the prosecution of the common design, thus rendering the acts and declarations of one done in furtherance of that design a part of the *res gestæ*, and therefore the acts of all."

The defendants prayed three instructions designed to define more closely the application of this general principle to the case, and to prevent a probable misapprehension of the law by the jury, the prayers being thus:

> (1) "Even if you should find that some one of the defendants intended to suborn perjury, or even actually did so, that would not justify a conviction of the charge in this indictment, unless you further find that two or more of these defendants definitely planned and agreed among themselves to procure the alleged perjury."

(2) "Even if you find that perjury was committed by one or more of the applicants in question, that would not justify a verdict of guilty unless you further find that at least two of the defendants conspired and agreed together to procure the perjury to be committed."

(3) "The defendants are not charged with defrauding or attempting to defraud the Government, and therefore any mere attempt to evade the law on their part (if there was any such attempt) would not justify a verdict of guilty, unless there was actually a conspiracy or an agreement between them to procure perjury."

These prayers were refused, to which action exceptions were reserved (Rec., 698, 699).

As defined by the court, a conspiracy is any combination to effect any unlawful design. While this statement is abstractly true, it was calculated to impress the jury with the idea that the defendants in this case should be convicted if any two of them had agreed upon any kind of unlawful scheme. The subsequent mention of "a common design," and the statement of the principle whereby the acts of each are evidence against all, were further adapted to suggest that any acts of one looking to a common purpose or inuring to the common benefit of others should be taken as evidence of a prior agreement on the part of all to accomplish the supposed design by those particular acts.

In this case the natural effect of such remarks, made without particular application to the facts or any caution against misapplication by the jury, was to suggest that proof of a common design to do anything would warrant the inference that any acts by any one of the parties were necessarily included in the scope of that design and contemplated by all the parties thereto. If the jury believed that Williamson and Gesner had agreed to enlarge their land holdings by legitimate means, and that Gesner in the execution of this common design had resorted to subornation of perjury,

the abstract statement of the court would very probably imply to the minds of the jurors that Gesner's acts were evidence of a criminal purpose in the pre-existing agreement.

If the jury believed that the original purpose of the defendants was unlawful, as to defraud the United States and the State of Oregon, or in some way to evade the law, the remarks of the court would warrant a conclusion that the defendants had been guilty of conspiracy, which would be true enough if the facts were so. But the court does not tell the jury that they must not convict unless they find also that the conspiracy so established included and contemplated the procurement of perjury, and that this was intended by all the parties to the conspiracy.

On the contrary, the instruction comes dangerously near to suggesting that if a conspiracy is proven for any unlawful purpose, all the acts of any one of the conspirators are evidence against all, and are evidence, too, to charge all with the intention to procure those particular acts. The result is that if the jury believed that the three defendants agreed to defraud the United States in some way not involving the subornation of perjury, then the subornation of perjury by any one of them would warrant a conviction of the charge in the indictment.

The court probably intended no such thing. But this was pre-eminently a case in which too great caution was impossible, and in which so broad an instruction should have been limited in its application to the particular issues, and so guarded as to avoid the possibility of misuse by the jury. The transactions shown were obviously in the interest of Williamson and Gesner, and dictated by the necessities of the firm. A jury might well infer a common design between the partners to obtain land. Looking to the instruction of the court, if it appeared that Gesner had resorted to perjury to accomplish this design, there was danger that the jury might infer, from the proof of that fact alone, that both of the partners had agreed upon that particular means

as an incident of the common purpose imputed to both. And when it is further considered that fraud in other transactions was sought to be fixed upon both Williamson and Gesner, it will appear even more likely that the jury were misled by the failure of the court to distinguish between evidence of a common design, or a common fraudulent design to obtain lands, or to do something else, and evidence of a common design to procure the commission of perjury.

Had the instruction prayed by the defendants been given, the jury would have understood that the criminal acts of Gesner did not necessarily imply a like criminality on the part of his associates, and would have sought for evidence to show that the scheme to acquire lands involved an intention on the part of others to suborn perjury. Inasmuch as there is no evidence in the record sufficient to prove that Williamson intended or contemplated any such means of obtaining land, it appears that the jury were confused and misled by the failure of the court to insist upon some proof of an agreement to proceed in an unlawful manner.

(7) The Intention and Understanding of the Applicants.

In permitting the witnesses for the Government to testify as to their understanding of the arrangements existing between them and Gesner, and as to their own intentions respecting a future disposal of the lands entered by them, the court committed numerous and substantial errors.

Twelve witnesses were called for the purpose of proving that they and other persons had, before applying for timber lands, made contracts with Gesner whereby the proposed entries were to inure to his benefit. Each of these witnesses was asked in minute detail concerning all his conversations and acts with reference to the lands, and each stated fully the negotiations and conduct of the parties concerned down to the time that he executed his sworn application. There-

upon, in each case the witness was asked what was his intention in respect of subsequent disposal of the land; and in most, if not all, of the cases the witnesses were required to state to the jury what was their understanding with respect to the contractual nature and binding force of the negotiations recited as having been had with Gesner.

In most instances of this kind the defendants objected to the questions concerning the intentions and understanding of the witness, on the grounds that such questions were incompetent, as calling for the conclusions of the witness upon the facts stated by him, and that the understanding and intentions of the applicant were not binding upon the defendants.

In every case in which this objection was made by the defendants it was overruled, and exception taken.

In one case, in which the defendants sought to ask one witness what was his understanding of his arrangement with Gesner, the question was ruled out on the objection of the District Attorney that it called for a conclusion of law, and exception was reserved by the defendants (Rec., 121).

(1) Error was necessarily committed by the trial court in making opposite and inconsistent rulings upon the competency of testimony as to the understanding of the witnesses.

In his direct examination of the witness Calavan the District Attorney brought out all the negotiations which the witness had had with Gesner, in the course of which the latter had said to the witness, "You will be under no obligation to sell to me" (Rec., 166). Thereupon the witness was questioned with reference to the ideas entertained by him at the time of his swearing to his application, and this question was put:

> "What was your understanding at the time as to what the terms were upon which you were taking it up?" (Rec., 163, 166).

To which the defendants, and each of them separately, objected, as calling for a conclusion of the witness, and in-

competent, and not binding upon said defendants in any way; but the objection was overruled and exceptions taken (Rec., 163); and the witness answered:

> "Why, I understood that I was to receive $500 for the claim when patent issued."

In the testimony of Frank Ray, another witness called by the Government, the court again ruled upon this point. The District Attorney had taken the witness over his dealings with Dr. Gesner which led up to his making an application, and had developed nothing more definite than a declaration by Gesner that he would give $500 apiece for quarter sections of patented timber land. Whereupon ensued the following:

> "Q. (By District Attorney). Now, do you remember whether he [Dr. Gesner] asked anything about whether you would agree to it or not, or whether anything was said on that subject?
>
> "A. Well, he told us what he wanted to do, and we went; he said he would take us and show us the ground—land—that afternoon, and I supposed—that was my understanding.
>
> "Mr. BENNETT. We object to what he supposed.
>
> "Q. What was your understanding?
>
> "Objected to as incompetent, immaterial, and not binding on the defendants.
>
> "A. We agreed to do what he proposed to us. That was my understanding.
>
> "Mr. BENNETT. I wish you would not answer the questions until the court rules upon them.
>
> "The COURT. I think that is competent. He can testify as to his understanding.
>
> "Mr. BENNETT. We take an exception" (Rec., 596, 597).

The same question, with respect to the understanding of the witness as to the contractual effect of his dealings with Gesner or Biggs, was put under similar circumstances to each of the witnesses Watkins (Rec., 155), Crain (Rec., 181),

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Hudson (Rec., 222), and Feuerhelm (Rec., 243). To the allowance of these questions exceptions were reserved.

In his direct examination of the witness Green Beard, after bringing out all the conversations and transactions had between the witness and Dr. Gesner, the District Attorney asked:

> "At the time you signed these papers, what was your intention as to what you would do with the land when you obtained title to it?"

To this question defendant objected, the objection was overruled, and exception taken (Rec., 110). The witness answered:

> "Why, the land was to go to—the land was to be turned over to Williamson and Gesner."

Shortly afterwards the District Attorney still further questioned this witness as to his understanding of the arrangement, and, being unable otherwise to elicit satisfactory answers, put this question:

> "Then you took it up with the full understanding that you were to turn it over to Dr. Gesner for the $500?
> "A. Yes, sir" (Rec., 111).

In this condition of the record, Beard having thus been allowed, over objection, to state his understanding of the alleged contract, counsel for the defendants, on cross-examination of the same witness, had brought out some further testimony relative to the nature of the supposed agreement, whereupon this occurred:

> "Q. There was no contract, no oral or written contract, or any kind of contract; only just an expectation on your part to sell it?
> "A. That is all.
>
> "Mr. HENRY. That is asking for a conclusion. The witness has stated what was said.
> "Objection sustained" (Rec., 121).

In seven instances, therefore, the Government was permitted to ask a witness what was his understanding as to the nature and effect of the arrangements he had stated as having been made with the defendants, in each case over the objection that the question was incompetent as calling for a conclusion of law on the part of the witness, and that his understanding was not binding on the defendants.

In the one case in which the defendants sought to avail themselves of the same ruling, by asking the same questions of one witness who had been allowed to answer the identical question when put by the District Attorney, the court ruled that the question was incompetent, as calling for a conclusion of the witness, the District Attorney having successfully raised the identical objection which had been overruled when made by the defendants.

Both rulings cannot possibly be correct. If the question was properly allowed when put seven times by the District Attorney, it was error to refuse it when put by counsel for defendants. If the question was properly overruled when asked by the defense, then seven errors were committed in permitting it to be asked by the prosecution. The grounds of objection to the questions, which were stated by the District Attorney and were stated in the same form by defendants' counsel, could not have been valid when raised by the Government and invalid when raised by the defense. Either the witnesses were competent to express their opinion as to the contractual effect of their dealings with Gesner or they were not competent. If they were competent, the opinion of Green Beard that there was no contract was a piece of evidence to which the defense was entitled. If such opinions were not competent, then the defendants were prejudiced seven times over by allowing seven witnesses to declare that they believed contracts to have been made. If the understanding of these seven witnesses was binding on the defendants, and competent to convict them of an infamous crime, the like understanding of one witness was equally

available to the defendants for the sake of showing that, in one instance at least, they were guiltless.

In one ruling or the other error was necessarily committed. As defendants excepted to the seven allowances of the question when put by the prosecution, and also to the refusal of the same question when put by themselves, it is immaterial, so far as affects their right to a reversal, whether the court was right in granting or in refusing permission to ask the question. No matter in which view of the subject the court was correct, it committed reversible error in acting upon the opposite view.

(2) The error, as counsel for the plaintiff in error believe, was in allowing the witnesses to be interrogated as to their respective opinions and purposes.

The extracts from the testimony which follow will show the circumstances and the manner in which this evidence was introduced.

In addition to that reason for setting out this testimony, counsel are moved by a desire to submit to the court that this evidence was insufficient, even when supplemented by the opinions of the witnesses, to show any contracts forbidden by the act of 1878, or any unlawful conduct whatever. In reading these extracts the court is especially solicited to examine the evidence with reference to this consideration, to be made the subject of later argument.

The nature of Gesner's negotiations looking to the entry of the lands, and the attendant circumstances, were thus developed upon the direct examination of the first witness, B. F. Jones:

> "Q. State to the jury how you came to make the filing, who, if anybody, spoke to you about it—provided it was one of these defendants—and what you did.
>
> "A. Dr. Gesner spoke to me about it at Prineville.
>
> "Q. State what he said. * * *
>
> "A. If I and my wife would take a claim, that he would give us $75 apiece when we proved up."

Gesner also indicated the region in which he desired the land to be taken.

> "Q. When you had this talk with Dr. Gesner, what did you say in reply to his proposition?
> "A. I told him that I would. * * * I told him we would go ahead" (Rec., 72).

A day or two after this conversation, the witness, with his wife and several other persons, some of whom were also called by the Government, went to the clipping corrals or sheep-shearing plant of Williamson and Gesner, which was near the timber lands. Here they found Dr. Gesner, who indicated to them a number of neighboring tracts which he advised or requested them to select. The intending applicants looked over the lands and several of them afterwards filed applications (Rec., 73, 74). Jones applied for one of these tracts, and swore to his statement before Biggs, who was a United States commissioner.

With reference to this occasion, the examination of the witness proceeded thus:

> "Q. Now, at the time you signed it and swore to it, did you intend to convey this land to Dr. Gesner for the consideration named by him to you, as testified by you, as soon as you obtained the title thereto?"
>
> Objection by defendants; overruled; exception.
>
> "A. Yes, sir.
> "Q. What was your belief, at the time you signed and swore to this, as to whether or not this statement in the paper was true: I do not apply to purchase the land above described on speculation, etc.?
> "A. Well, if I had got the $75, it would have been for my benefit, wouldn't it?
> "Q. The $75 would have been, yes.
> "A. Yes.
> "Q. But what was your belief as to whether the purpose with which you were taking the land was to have the land for your own special use and benefit?
> "A. Well, I had agreed to have taken that from Gesner, of course; I admit that—that I did agree to take it from him.

"Q. Then you knew at the time that this statement was not true?

"A. Yes, sir" (Rec., 75).

With reference to the intention and understanding of the witness at the time when he made final proof, he was thus examined:

"Q. Mr. Jones, at the time that you subscribed this final proof paper, what was your intention with reference to this land, as to what you would do with it when you obtained title?"

Objection by defendants; overruled; exception.

"A. Let Gesner have it.

"Q. Under that agreement?

"A. Yes, sir" (Rec., 82).

On cross-examination occurred the following:

"Q. Now, when you had that conversation with Dr. Gesner about the matter of filing, that you speak about, did he tell you that he was having trouble with the cattle men up in that vicinity?

"A. Yes, sir. * * *

"Q. And he told you at the same time, didn't he, that he was very anxious to get the grass for that season?

"A. Yes, sir.

"Q. And he told you, didn't he, in the same conversation, that he would loan you the money, and let the grazing privilege stand off the interest?

"A. He told me he would furnish the money.

"Q. Well, didn't he tell you that he would loan you the money, and let the grazing privilege stand off the interest, as long as you let him have the use of the land?

"A. He said he would furnish me the money; that is just what he said to me.

"Q. Well, how about the balance of it—if you want to put that word furnish in there—if you are so particular about that. * * * Did he tell you that he would let the grazing privilege stand off the interest as long as you let him have the use of the land?

"A. Yes, sir.
"Q. He did; in that conversation?
"A. Yes.
"Q. You remember that very plainly, do you?
"A. Yes, sir. * * * He told me just like this: He would furnish me the money, just as I told you, and would charge me no interest; he would take the grass for the interest on the money * * * He was to furnish it to me; I was to pay him back" (Rec., 91, 92, 93).

On further cross-examination, this witness admitted that Gesner was at the time indebted to him, on account of the sale of some horses in which they were jointly interested, to the amount of $700 or $800 or $900 (Rec., 94, 95), and that, when he appeared before Biggs to make his application, he told Biggs that Gesner would furnish the money (Rec., 94).

Green Beard testified that Biggs asked him if he did not want to take up a timber claim for Dr. Gesner, and said that Gesner would give $500 a claim and furnish the money to prove up on the claim (Rec., 105). Beard said that he "might take up a claim for him," and afterwards went, with some other persons, to Gesner's sheep shearing plant. Up to this time he had had no negotiations of any kind with Gesner. At the sheep shearing plant, Gesner, to use the words of the witness—

"Made a little talk. * * * He said that—I can hardly recollect now what he did say. He was talking some to me about something about money matters, to them, I think, in regard to their claims. * * * I think he said they would have to give him a mortgage on these claims to secure him, or something like that.
"Q. For how long a time?
"A. Oh, a short time, I suppose.
"Q. Never mind what you suppose now; I want to know what he said, if anything.
"A. Well, that was about all he said, that they would have to give him a mortgage on his land to secure him a certain length of time.

"Q. Did he say how long or until what event?
"A. I don't think he did.
"Q. (By a Juror). How long?
"A. I say, I don't think he said anything about the length of time.
"Q. Didn't he say it was until you got title? * * *
"A. Well, he wanted these mortgages until they got their title" (Rec., 106, 107).

The witness having thus stated the character and purport of Gesner's proposition, he was asked:

"Q. At the time you signed these papers, what was your intention as to what you would do with the land when you obtained title to it?"

Objection; overruled; exception.

"A. Why, the land was to go—the land was to be turned over to Williamson and Gesner" (Rec., 109, 110).

To illustrate the method of proving this alleged contract, the passage on page 110 is instructive. A juror asked the privilege of asking a question of Beard, and it was put in this form:

"I should like to know if at the time of the entry of this land it was expressly understood that when this mortgage was given to Dr. Gesner by the one who entered the land, that the land was to be turned over to Gesner, or if he had the privilege of selling it to any one else and redeeming the mortgage, if he desired?
"Q. (Evidently by the District Attorney.) What was your understanding in regard to that?
"A. Well, there was nothing said about turning it over to any other party.
"Q. Then you took it up with the full understanding in regard to that ?
"A. Well, there was nothing said about turning it over to any other party.
"Q. Then you took it up with the full understand-

ing that you were to turn it over to Dr. Gesner for the $500?

"A. Yes, sir."

In the cross-examination of this witness this fact was developed:

"Q. At that time, up there, did not Dr. Gesner tell you, when he was making that talk in that conversation, that he would not buy the land at that time, or make any contract for it, and that you could not, all of you there?

"A. I think he mentioned something about that, yes.

"Q. He said that in substance, didn't he?

"A. I think he did" (Rec., 120).

At a later point in his cross-examination the witness testified that Gesner declared, in the presence of the intending applicants, that he would not and could not make a contract to buy the lands; whereupon followed:

"Q. You understood, then, that you had not made any contract to sell the land? You were told up there that you could not make any?

"A. No, sir; we hadn't made any contract, to any extent. * * * We didn't have no contract, no written contract. * * * We had an understanding.

"Q. Well, that was just something that you gathered in your own mind, that you expected to do; but you did not agree to do anything, did you?

"A. I didn't exactly agree to do anything. Of course, we had an understanding amongst ourselves.

"Q. Yes, you expected to sell it to him?

"A. I expected to let him have it, yes, sir.

"Q. If you could not do any better?

"A. Well, there was nothing said about doing better, anything of the kind.

"Q. Nothing said about that, one way or the other?

"A. No, sir.

"Q. Nothing said that would prevent you doing better if you could?

"A. No, sir.

"Q. There was no contract, no oral or written contract, or any kind of contract, only just an expectation on your part to sell it?

"A. That is all.

"Mr. HENEY: That is asking for a conclusion. The witness has stated what was said."

Objection sustained.

"Q. I will ask you this question: Isn't it true that you did not say a word, one way or the other, up there, as to whether you would sell the land to Dr. Gesner or not, when you were talking to him?

"A. That I did not say a word?

"Q. Yes. * * *

"A. I don't think we did say anything, but it was the understanding that he was to get the land. * * *

"Q. You don't think there was a word said?

"A. No; but it was the understanding he was to get the land.

"Q. That was just an understanding or something that you got in your mind?

"A. I don't know whether it was or not" (Rec., 120, 121).

At a former time this witness had testified explicitly that, according to his understanding, the applicants were to be at liberty to sell to anybody they chose, and were to sell to Gesner only in case no one offered more (Rec., 122).

On redirect examination the District Attorney thus undertook to refresh the memory of his witness and to develop the nature of the contract:

"Q. Now, up in the timber at the time Dr. Gesner was talking to you about not being able to make a contract to buy or sell, didn't he say to you that while he could not, as a matter of law, make a contract to buy, or you to sell, that it was all right, that he would have to take a mortgage for a short time until you got title, so as to avoid trouble with the Government,

and that it was all right, that as soon as you got title he would give you the $500 for the land?"

Objected to as leading, and putting the very words in the witness' mouth. Objection overruled. Defendants except.

"A. Yes, sir, he said that" (Rec., 127).

After this passage followed a short recross-examination, and the witness was excused at the hour of the noon recess. At the opening of the afternoon session, the witness was recalled for further direct examination, as follows:

"Q. Mr. Beard, while you were on the stand a while ago, did you tell all that was said by Mr. Gesner when he was talking to you and Frank Ray and these other parties there in the timber?

"A. No, sir.

"Q. What else was said that you recall?

"A. He said when the time came to prove up he would furnish the money to prove up on, and after we got title he would pay us the balance, and he wanted to know if we were satisfied with that.

"Q. How is that?

"A. He wanted to know if we were satisfied, and I said yes."

Cross-examination:

"Q. Whom have you talked with since you were on the stand before?

"A. Nobody.

"Q. Talked with Mr. Heney?

"A. Not to amount to anything, no, sir.

"Q. Have you talked with him about this matter you have just testified about?

"A. No, sir. * * *"

Redirect examination:

"Q. You told me you had left this out?

"A. You must have asked me if I told it all, and I told you, no, sir, I hadn't told it all."

Recross-examination:

"Q. Who asked you if you had told it all?

"A. Mr. Heney asked me if I had left that out, and I told him I had.

"Q. He suggested that you had left that out?

"A. Yes, he asked me if I had told it all, and I told him I hadn't.

"Q. Did he mention this matter and ask you if you had left it out?

"A. Yes, sir" (Rec., 130, 131).

John S. Watkins (Rec., 132, 136) had heard through one Duncan, a person in no wise connected with the alleged conspiracy, that Williamson and Gesner wanted land. He applied to Biggs for information, and was told that the firm would advance the necessary money upon the land and would pay $500 for the title. He asked Biggs if the transaction would be lawful, and was told that it would be, and that no contract would be made. Some time later he told Biggs that he had made up his mind "to go and file on a timber claim, me and my folks."

Witness accordingly went to the sheep shearing plant, and was given by Gesner a memorandum of the land for which he afterward made application (Rec., 137). Up to this point the witness had not stated a contract with any one, and not even a negotiation with either member of the firm. He was now asked:

"Q. What was your intention, at the time you signed this [the application], as to what you would do with the land, if anything, when you got it?"

Over the objection and exception of defendants, witness was allowed to answer:

"I intended to convey it to that company—Williamson & Gesner" (Rec., 132, 138).

Watkins borrowed $400 from Gesner, to secure which he gave a mortgage on the land. The entry being suspended, this money was returned to Watkins by the General Land

Office, whereupon he repaid Gesner and recovered back his note and mortgage (Rec., 144, 155).

On cross-examination, this witness was asked:

> "Q. You expected to get a whole lot more than that [$500] out of it, didn't you?
>
> "A. No, I don't know as I did. * * *
>
> "Q. Didn't you expect to get a good deal more than $500?
>
> "A. I thought at times I might, but I really did not expect to do it. I expected to sell it to them for that $500. That is what I calculated to do.
>
> "Q. You said you thought at times you might get more?
>
> "A. Yes, I had them thoughts at times, that I might" (Rec., 145).

At a previous trial of this case, the same witness had testified on this point:

"I calculated to ask him $800 or $1000 for it when the time came to sell it to him" (Rec., 145); that he had considered himself free to sell to Gesner or not, as he pleased; and that it had been his intention to sell to the highest bidder (Rec., 146, 147).

In explanation of this change in his testimony occurs the following:

> "Q. Now, Mr. Watkins, have you been threatened with indictment if you did not change your testimony?
>
> "A. No, I have not been threatened with indictment. Mr. Heney said to me before the grand jury would be in session afterwards. * * * Mr. Heney said to me before the grand jury, if the truth was not told in the matter that the grand jury would still be in session. I don't know what he meant. I think that is what he said. * * *
>
> "Q. Now, on the 8th of this month, between 12 and 1 o'clock, in front of the court house, did you say to S. E. Starr that you were going to change your testimony; that you hated to, but you had to, for you

were afraid they would indict you, or words to that effect?

"A. Yes, sir" (Rec., 148). * * *

"Q. Didn't Mr. Heney tell you, in his office, that he was a bad man and to be feared, during the last trial of this case?

"A. I don't know as he said he was a bad man. He took me up to his office, and he said he expected the truth out of the witnesses. He said he was a man to be feared" (Rec., 152).

Joel Calavan testified that Biggs had told him that if he would take a timber claim Gesner would pay $500 for the title. Biggs, at the same time, explained that no contract could be made, but that an understanding could be had. Calavan went to the land, with some others, where they found Gesner. Gesner explained to them that he wanted land for range purposes and to protect his range from other stockmen, and said that he would lend them money to be secured by mortgages, and that he would buy the claims for $500 after issue of patent. "But," he says, "you will be under no obligation to sell to me" (Rec., 164, 165, 166).

Thereafter witness was asked:

"Q. What was your understanding, at the time, as to what the terms were upon which you were taking it up?"

Objection; overruled; exception.

"A. Why, I understood that I was to receive $500 for the claim when patent issued.

"Q. And was it your intention, at the time you were making that filing, to convey it for the $500 as soon as you did get patent?"

Same objection.

"Q. Or what was your intention in respect to it?

"A. My intention was to convey it to them when I got patent."

Objection, overruled, and exception (Rec., 163, 166).

W. J. Crain learned from Watkins that Williamson and Gesner were willing to buy timber land and would pay $500 for a claim (Rec., 181). When he came to swear to his application, Biggs inquired of him whether he had had any negotiations with Williamson and Gesner, and, upon being answered in the negative, assured him that he could properly swear that he had made no contract (Rec., 183), which advice, it is submitted, was perfectly sound. Notwithstanding this affirmative showing of an utter absence of any possible contract, or even mutual understanding, the District Attorney was permitted, over the objection and exception of defendants, to ask these questions and to elicit these answers (Rec., 184):

> "Q. Now, at the time you filed, what was your intention as to what you would do with the land when you got title?
>
> "A. It was my intention to let Gesner have it.
>
> "Mr. BENNETT (for defendants). My same objection goes to all this, your honor. * * *
>
> "Q. What was your understanding as to whether you had promised to do that or not?
>
> "Mr. BENNETT. We object to that, your honor. Let him state the facts.
>
> "Mr. HENEY. This goes to the question of his belief at the time he made this.
>
> "The COURT. He may state his belief.
>
> "Mr. BENNETT. We object to it as incompetent, immaterial, and not in any way binding on the defendants. (Exception taken; see Rec., p. 181.)
>
> "Q. Did you believe you were obligated?
>
> "Mr. BENNETT. That is objected to as leading.
>
> "Q. Well, what did you believe?"
>
> Objection on same ground; overruled; exception (Rec., 181).
>
> "A. You mean, do I believe I was under obligation to let them have it?
>
> "Q. Yes.

"A. Well, I would have felt that way if I had went ahead and proved up on the land, and they had furnished me the money to do it with.

"Q. Was that your understanding of it?"

Objected to as leading, and calling for the understanding of the witness; overruled; exception taken (Rec., 181).

"A. Yes, sir."

It will be observed that the witness, according to his own account, had never talked with Gesner or Williamson or Biggs about sale or price; that his only dealing with either had been to accept from Gesner a description of a tract subject to entry, and to explain to Biggs that he had not talked with anybody about selling.

Jeff Evans had for some time been considering the making of an application for timber land, and, upon his own initiative, applied to Biggs for information as to where he could borrow the necessary money (Rec., 198). Biggs referred him to Gesner. Gesner agreed to lend him the money, and to demand no interest so long as his (Gesner's) sheep were allowed to graze on the land (Rec., 213), and told him further that he would pay $500 for the title if Evans desired to sell (Rec., 198, 213). He did not say he would buy it, but that it would be worth that sum to him if Evans wanted to sell. Evans did not say that he would or would not sell, but borrowed the money, for which he gave his note, due in one year, without interest (Rec., 213, 214). Evans did not consider himself bound to sell to Gesner, and intended to sell to the best purchaser (Rec., 215).

Although the transaction, as the witness had stated it, was no more than is here set out, the Government was permitted to ask Evans what were his intentions in respect of the land, and to draw out the answer that the witness "calculated to sell it;" that he supposed Gesner would take the land and pay $500 for it (Rec., 201, 202). This over objection and exception (Rec., 197).

Henry Hudson was asked by Dr. Gesner whether he wanted to take up a claim. Hudson answered that he would if he could make anything out of it. Gesner said a claim was worth $500 to him if he could get title, and that he would furnish the money (Rec., 220, 221). Witness borrowed the money and secured the loan by a note and a mortgage (Rec., 222). Over the objection and exception (Rec., 222) of defendants, the District Attorney asked:

"Q. What was your intention as to what you would do with the land when you signed that? * * *

"A. Well, I was going to sell it, of course, if I could; I took it up for speculation.

"Q. Sell to whom?

"A. Well, I was going to sell it to the highest bidder. I was calculating to make a thousand dollars out of it if I could, and if I couldn't I would let it go to Dr. Gesner.

"Q. What did you understand at that particular time as to whether you had agreed to sell to Dr. Gesner or not?"

Objected to as incompetent and immaterial and not binding on defendants; overruled; exception (Rec., 219).

"A. Well, now, I don't know; it was kind of an agreement; a verbal one, though.

"Q. A verbal one?

"A. Yes.

"Q. And you mean you were going to fall down on the agreement?"

Objected to as leading.

"Q. Did you think you had a right to sell it to somebody else?

"A. Well, I don't know if I had the right or not, but I had the drop on him; I was going to sell to somebody else if I could get it.

"Q. You don't think if you had, it would have been exactly square to the Doctor, did you at the time?"

Objected to as leading; overruled; exception.

"A. What was the question?

"Q. You didn't think if you sold it to anybody else, you would be giving the Doctor exactly a square deal, did you?

"A. Well, I didn't think it was honest of me, but at the same time I was going to do it" (Rec., 222, 223).

Christian Feuerhelm, on his own initiative, approached Dr. Gesner and asked if the latter would buy a timber claim if witness would get the title. Gesner said he would pay $500 for such a tract. In response to this, witness said nothing at all, but proceeded to make an application (Rec., 247). Having testified to these facts, and to nothing else in the way of agreement or negotiation, witness was asked, over objection and exception (Rec., 243):

"Q. Now at the time you filed this paper—signed it—what was your intention as to what you were going to do with the land when you got title to it?

"A. Well, I thought it should go to Gesner" (Rec., 247).

At a later point (Rec., 257), although most vigorously pressed by the District Attorney, this witness could not be induced to say that there had been any contract between himself and Gesner, or that he had entertained any definite purpose in regard to the land. The course of examination was thus:

"Q. Wasn't it your understanding, when you left Gesner and went to make that filing——

"A. I didn't understand.

"Q. When you left Gesner and went to make that filing——

"A. Yes, sir.

"Q. Wasn't it your understanding that by doing that you had given him to understand that you agreed to his terms, and would let him have the land for $500?"

Objected to as leading and putting words in the witness' mouth. * * *

"Q. What was your understanding when you left Gesner, and when you filed on the claim, as to whether you had promised that you would let him have it when you got the title?

"A. Well, there was no real promising. * * *

"Q. But what was your understanding as to what he believed, and what did you believe?

"A. I believed nothing else, but I went in to file on the claim.

"Q. Did you think he was furnishing you the money for you to get the claim and sell it to anybody you pleased?

"A. Well, I didn't thought.

"Q. You didn't think that?

"A. No.

"Q. What did you think?

"A. I think I didn't thought nothing" (Rec., 258).

Mrs. Lettie Watkins, wife of John S. Watkins, was told by her husband, and by no one else, that Williamson and Gesner would pay $500 for a tract of timber land. She had had no communication at any time with any of the defendants, and her statements as to what her husband told her were objected to as hearsay, and were admitted over the exception of defendants (Rec., 261). On going to the timber, with others, she found Williamson and Gesner, and saw the former write some numbers in a book. She remembers no conversation between any persons as occurring at that time and place. Afterwards she signed an application paper.

At this stage of her testimony, witness was asked, over objection and exception of defendants:

"Q. Now, at the time you signed this paper, what did you intend to do with the land when you got title to it? * * *

"A. Well, my understanding was that it was to go to Williamson and Gesner.

"Q. And for what consideration. For how much?

"A. About $75" (Rec., 262).

After the Government's case had been closed, and after the defense had been put in, three witnesses called by the Government in rebuttal were examined as to their dealings with defendants in respect of timber lands.

Frank Ray, whose name was endorsed on the indictment, and the preparation of whose application is alleged in that instrument as one of the overt acts, was called in rebuttal to strengthen the proof of corrupt contracts. He had been told by his father-in-law, Green Beard, that Williamson and Gesner would pay $500 for a tract of timber land; to which statement of the witness objection was made on the ground that it was hearsay, and exception taken (Rec., 595).

Witness went, with others, to the timber, where he found Gesner, who said—

> "that he wanted to get us to take up some timber claims; that there was quite a timber craze in there, and he was afraid Eastern people would come in and get the timber and take the range away from the sheep—stock—something. I don't know as he mentioned sheep. And he told us that he would give us $500 apiece for the claims when the proof was made. He would put up the money for us.
>
> "Q. Did he say anything about a mortgage?
>
> "A. Yes, sir.
>
> "Q. What did he say about it?
>
> "A. He said he would have to take a mortgage to make things look right.
>
> "Q. Now, do you remember whether he asked anything about whether you would agree to it or not, or whether anything was said on that subject?
>
> "A. Well, he told us what he wanted us to do and we went; he said he would take us and show us the ground—land—that afternoon, and I supposed—that was my understanding.
>
> "Q. What was your understanding?"
>
> Objection; overruled; exception.
>
> "A. We agreed to do what he proposed for us. That was my understanding. * * *

"Q. Do you remember anything being said as to whether it was satisfactory or not?

"A. Why, I don't remember what he said. He just told us what he wanted us to do, and he said—I supposed he understood that it was satisfactory; yes, I don't know as he said anything right then. * * *

"Q. Did he at any time ask you whether it was satisfactory or not, or anything to that effect?

"A. No, I don't know as he did" (Rec., 596, 597).

On his cross-examination this witness stated, referring to his statement on direct examination that Gesner had "said he would have to take a mortgage to make things look right," that he saw no difference between the term "to make things look right" and the term "to make things right" (Rec., 605).

At a later point in his direct examination than that quoted, over objection and exception the witness was asked and allowed to answer as to his intention in respect of the land and his understanding as to the existence of an agreement (Rec., 600).

George M. Gaylord learned that Williamson and Gesner would buy timber land, through John S. Watkins, by whom he was employed. His testimony as to the communications made to him by Watkins was objected to as hearsay, and admitted over defendants' exception (Rec., 648). Upon going, with others, up to the timber, he was introduced to Williamson by Watkins, who told Williamson that witness "was all right for a claim." Thereupon Williamson gave the persons some advice as to the land which they should select, the witness went over the ground, and a few days later filed an application, which was sworn to before Biggs. In relation to this transaction, witness was asked?

"Q. Did you tell him what your understanding was with Dr. Gesner?

"A. I had no understanding with Gesner at that time at all."

Notwithstanding this explicit negative of any understanding, the District Attorney proceeded:

"Q. What was your intention as to what you would do with the land when you got it?

"A. My intention was to turn it over to Williamson and Gesner when I got the title to it" (Rec., 650).

Campbell Duncan, called by the Government in rebuttal, testified that Biggs had told him that Dr. Gesner would loan witness money to enter a tract of timber land and would pay $500 for the title, and that "he could make no contract, but we could understand one another in regard to the price to pay for it" (Rec., 542). Thereafter Duncan went up to the timber, where he found Gesner, who said—

"that he would loan us, I think it was $450 or $475 when we proved up and gave him a mortgage on the land for thirty or sixty or ninety days, something like that. When we were ready to turn it over, he would pay the balance, the remainder of the $500 for the deed.

"Q. Was anything said by you folks in regard to that?

"A. I don't remember anything" (Rec., 543).

At a later point in the direct examination of this witness occurred the following, in regard to what was done at the time of swearing to his application papers:

"Q. Do you remember whether anything special was said about that, and as to your right to have any agreement or understanding with Dr. Gesner or any one else as to what was to become of the land after you got title? Do you remember whether Mr. Biggs said anything about that at the time? * * *

"A. He said we could have an understanding. We could not make any contract.

"Q. What did you understand by contract?"

Objection; overruled; exception.

"A. I thought that it had to be drawed up in writing.

"Q. Now, at the time that you signed this, what

was your intention as to what you were going to do with the land when you got title?"

Objection and exception.

"A. I intended to let them have it" (Rec., 545).

In not one of these cases had the witness stated a contract whereby his proposed entry would inure to the benefit of Gesner. The facts testified to clearly did not constitute a contract of any kind, and the negotiations recited amounted to nothing more on either side than had been expressly declared in this court to be innocent and permissible under the act of 1878. The testimony was more or less clearly to the effect that Gesner had, directly or indirectly, informed the several witnesses that he needed timber land and would pay $500 for every quarter-section to which title could be made. In some cases he had agreed to lend the purchase price and filing fees on the security of a mortgage. The several witnesses had been, more or less directly, induced by this offer to become applicants, and were acting in reliance upon the security of finding a purchaser in Gesner. All of which was entirely legitimate, as was held, in reference to entries under this very act, in United States *vs.* Budd, 144 U. S., 154.

Had the case of the Government stopped with the facts which the witnesses related as constituting their transactions with Gesner, the verdict must necessarily have been an acquittal. The District Attorney was evidently oppressed by a consciousness of this fact, and was driven to the hazard of casting into the scale the secret purposes of the applicants, and of supplementing the mutual negotiations, in which Gesner had a share, with the private interpretation which the several applicants with whom he dealt had placed upon the words and acts of Gesner.

In order to clothe Gesner's public offer to purchase with the semblance of a contract, it was deemed necessary and proper to show that those who acted upon it considered that, by merely acting upon it, they had converted his proposition into a contract; and in order to impress the jury with the

criminality of the proceeding, the witnesses were put upon the rack and forced to admit that they had intended to violate the law, as the law was expounded by the District Attorney and the trial court.

Thus to supplement the facts with the opinions of witnesses as to the legal effect of those facts, and to convert an innocent and legitimate transaction into a guilty one by making some of the persons concerned confess to a supposed criminal purpose, was plainly incompetent.

(3) The intentions entertained by the applicants at the time of applying for the lands were clearly irrelevant to the guilt or the innocence of the defendants.

At no point in the foregoing extracts, it will be observed, did any witness pretend that he had expressed to Gesner, or to anybody else, an intention to convey the title. Now, is there anywhere in the record any testimony showing the expression of such intention by anyone. Even the declaration dragged out of Beard, after a private conference with the District Attorney (Rec., 130), that Gesner asked the applicants if they "were satisfied with that," can not amount to any promise of a transfer, and this is the nearest that any witness came to stating an expression of intention to sell to Gesner.

The secret purposes of the applicants, however criminal such purposes might be, could not affect with guilt the persons with whom they dealt.

Nor were the purposes of the applicants, as stated by them, criminal or otherwise reprehensible. These persons, in making entries of timber land, were guilty of nothing unlawful because they expected to convey their titles to Gesner, and were moved in the premises by his promise to buy the lands at a certain price:

United States *vs.* Budd, 144 U. S., 154.

The only purpose of evidence as to the intentions and opinions of the witnesses was, therefore, to create in the minds of the jury a conviction that these transactions, which were in themselves innocent and legitimate, would be criminal if

the witnesses intended to convey to Gesner, and such was clearly the necessary effect of this testimony. Under stress of the District Attorney's drastic cross-examination of his own witnesses, some of them were driven to admit some doubts as to the propriety of their conduct in the premises, and to confess more or less sense of guilt in their intentions; by the District Attorney's constant hammering upon the assumed fact that the arrangements were illicit; by the approval of that assumption continually manifested in the rulings from the bench; by the repeated questions which implied that the accusing consciences of the applicants supplied complete evidence of the defendants' criminality, the jury were impressively told that every applicant's secret intention to sell his title was proof that Gesner had flagrantly violated the law.

(4) The understanding of the witnesses as to the nature and effect of their dealings with Gesner were even more clearly incompetent, and even more palpably prejudicial to the defendants.

It will be observed that each witness was obliged to state fully and in detail all that was said and done, both by Gesner and by himself, until all the facts were completely before the jury. Then the witness was asked to tell what was his understanding of the transaction with respect to its nature as a contract and his obligation thereunder to convey the land. In most cases satisfactory answers were obtained only by the boldest leading, and in some cases only by stating to the witness what was desired and asking him to assent to it.

The impropriety of asking any witness to state his conclusion as to the legal effect of certain facts is so manifest as scarcely to warrant the citation of authority on the point; but some cases may be mentioned as illustrating the extent to which such questions have been disapproved:

Gentry *vs.* Singleton, 128 Fed., 680.
In re Weisenburg, 131 Fed., 524.
Herritt *vs.* Clark, 91 Ill., 608.
Crowell *vs.* Bank, 3 Ohio St., 411.
Shepard *vs.* Pratt, 16 Kan., 211.
Ives *vs.* Hammond, 5 Cush., 535.
People *vs.* Sharp, 107 N. Y., 461.

"After having exhausted himself as to what was said, it was clearly incompetent for him to characterize the testimony. Whether a new contract was made was a question for the jury, and not for the plaintiff, to answer."

Foster *vs.* Murphy, 135 Fed., 51.

The vital point in the case was the making of contracts whereby the entries should inure to the benefit of Gesner. On that question, as the case was tried, was made to turn the guilt or innocence of the defendants; since, if no contracts had been made, there had been no perjury, no subornation, and no conspiracy. The existence of the contracts—that is to say, the sufficiency of the facts proved to constitute contracts—was the *factum probandum,* which it was the province of the jury to find, under the advice of the court as to the legal nature and essentials of a contract.

The sole purpose, and the necessary effect, of this opinion evidence was to forestall the consideration by the jury of this question, and to substitute the beliefs of the witnesses, not only for the facts necessary to constitute contracts, but even for the advice of the court upon the legal requisites of a contract. Instead of proving negotiations which would show the making of contracts, the Government was allowed to show that certain unlearned, and some illiterate, persons understood that they had made contracts; and instead of instructing the jury as to whether the transactions were of contractual character and effect, the court contented itself with leaving that controlling question to be determined by the jury in the light only of the opinions of these witnesses.

Unless Gesner's dealings with the applicants resulted in the making of unlawful contracts, there was no criminality on the part of anybody. But it was evidently assumed that if these witnesses believed that they had made forbidden contracts, it must follow that the facts proven amounted to such contracts.

Upon no other theory could this evidence have been admitted; and the jury must have understood, as the court

and the District Attorney plainly indicated to them, that the arrangements shown were illicit if the witnesses thought that they were under obligations to transfer the lands to Gesner.

(8) Impeachment of the Witness Branton.

Manifest error was committed by the court in permitting the Government to introduce evidence tending to impeach the witness P. L. Branton by contradicting him in regard to collateral and immaterial matters brought out by the Government on his cross-examination.

Branton was an important witness for the defendants. He was the only witness who talked with Dr. Gesner about taking land who had not made application—he was under no fear of indictment. He testified in his direct examination that he was present and heard a conversation between the defendant Gesner and Campbell Duncan, Frank Ray, and Green Beard at the sheep-shearing plant in June, 1902; that during the conversation Beard asked Gesner if he would buy the timber claims, and Gesner said he could not buy them—that he had had legal advice on the matter, and had been advised that he could not make any contract to buy the claims, and that they could not make any contract to sell them; that Gesner further said that after they got their patents if they wanted to sell the claims they would be worth $500 to him; that Gesner told them if they wanted to take the claims he would lend them the money to prove up with, and would take a note and mortgage to secure the principal, and would charge them no interest if they would let him have the use of the land for grazing purposes (Rec., 522, 523).

On cross-examination, the witness stated that a day or two before the conversation above alluded to he was traveling through the country, and stopped at the place of one Adams. He was asked by the Government where he was going, and

stated that he was going to eastern Oregon, from Lane county. Thereupon the following took place:

"Q. I thought you were on your way to Idaho, wasn't you?
"A. When I met Campbell Duncan?
"Q. Yes.
"A. No, sir; I was not.
"Q. Did you say you were?
"A. I did not.
"Q. You didn't tell him that?
"A. I did not.
"Q. Didn't tell anybody that?
"A. I did not.
"Q. How did you come to go to Campbell Duncan's house?
"A. I was on my way to Vale, Oreg., in the eastern part of the State * * *" (Rec., 529, 530).

Thereafterward the Government called the witnesses Campbell Duncan and William Adams, who, over the objection of the defendants, were permitted to state that on the occasion referred to Branton had said that he was going to Idaho (Rec., 585, 593).

Branton was also asked, on cross-examination, if he had not stated, in a conversation with Frank Ray, about a year after the conversation with Dr. Gesner at the sheep-shearing plant, that the reason he (Branton) did not take a timber claim at that time was because there wasn't enough in it, and he denied making such a statement (Rec., 533, 534). Over the objection of the defendants, the Government was afterwards permitted to contradict Branton on this point, and to show by the witness Frank Ray that Branton had made the statement attributed to him (Rec., 615).

In permitting the Government to contradict Branton on these two points, the court clearly erred. The witness was not questioned in regard to these matters in his direct examination, but they were brought out by the Government on cross-examination. They were collateral and immaterial matters, and the cross-examiner was bound by Branton's

answer to his questions in regard to them. The rule that where a witness on cross-examination is questioned as to collateral matters, his answers are conclusive on the cross-examiner, and cannot be contradicted, is too elementary to require citation of authority.

III.

The Whole Case.

(1) The Bill of Exceptions.

(*a*) *All the Evidence is Contained in the Bill.*

Although the bill of exceptions contains no affirmative averment to the effect that the whole of the evidence is set out therein, it is manifest that the bill embodies all the testimony given and offered at the trial. The testimony of each witness is set out verbatim, by questions and answers, and in each instance the report is certified as being all of the testimony of the witness. The testimony thus given appears in regular sequence, and the bill shows entries of the adjournments and other proceedings incident to the trial. The inference seems necessary that the bill contains all the evidence, and some of the present argument proceeds upon that assumption.

Where the record purports to set out the testimony of the several witnesses in succession, with entries showing adjournments and other steps in the progress of the trial, it will be inferred that the substance of all the evidence is embodied in the bill of exceptions, although there is no affirmative averment to that effect:

Gunnison Co. Comm'rs *vs.* Rollins, 173 U. S., 255.

And this rule applies *a fortiori* in a criminal case:

Clyatt *vs.* U. S., 197 U. S., 207, 220.

A bill of exceptions purporting to contain a recital of evidence, apparently full and in regular order of sequence, may be accepted as a complete statement, in substance, of the evidence:

Fields *vs.* U. S., 27 App. D. C., 447.
Klopfer *vs.* D. C., 25 App. D. C., 41.
McCaully vs. U. S., 25 App., D. C., 409.
Rockwell *vs.* Traction Co., 25 App. D. C., 98.

> "In the absence of a positive statute or a rule of court to the contrary, a recital or certificate need not state in express terms that all the evidence is set out. It is sufficient if it affirmatively appears from a reasonable construction of the language used that the material evidence is preserved."
> 3 Cyc., 168.

(*b*) *The Averment as to the Sufficiency of the Evidence.*

The averment at the beginning of the bill that "the plaintiff offered evidence during said trial sufficient to go to the jury tending to prove each and every material allegation of the indictment," must be read in the light of the evidence reported, and limited by considerations arising upon that evidence.

This averment, of course, is a mere conclusion of law, resting upon the sole authority of the trial court. The bill does not appear to have been settled by consent; and if had been so settled, the assent of defendant's counsel to such a statement would not conclude them as to the legal sufficiency and effect of the evidence.

Still less can this recital be binding upon this court, or cut off appellate consideration of the point thereby sought to be established. This averment is no more than the certificate of the trial court that the proof was, in the estimation of that court, sufficient to sustain a verdict against the defendants. That holding was necessarily involved in allowing the case to go to the jury and in allowing a verdict to be rendered

against the defendants. The bill therefore avers no more than that the trial judge believed that his conduct of the trial was correct, and that he committed no error in respect to the competency and sufficiency of the Government's proof.

But this is one of the very questions which it is the function of a writ of error to bring in review, and one upon which the judgment of an appellate court is with pre-eminent propriety invoked. The only possible purpose of the pronouncement in question is to foreclose argument upon all points involving the competency, materiality and sufficiency of the evidence reported in the bill; and its effect, if it be given any effect at all, is to conclude the judgment of this court upon the subjects most clearly within the appellate jurisdiction.

Much of the evidence, and that upon most vital points, was admitted in manifest error, besides having been elicited by highly censurable methods of examination; and to the action of the trial court in respect to this evidence there are numerous and well-grounded exceptions. If the judge's certificate as to the sufficiency of the Government's evidence applies to anything at all, it must equally cover all these incidents of the proof, no matter how flagrantly the court may have erred therein. In one instance, at least, the rulings of the court upon the same questions were directly opposed to each other, and are palpably inconsistent; and part of the the evidence now certified to be competent and material as part of the Government's case was solemnly adjudged incompetent and immaterial when offered by the defendants (Rec., 111, 121, *supra*).

It will hardly be contended that this averment in the bill as to the sufficiency of the Government's case deprives the plaintiff in error of the benefit of his exceptions to any part of the evidence making that case. Nor can it be conceded that a trial court can establish beyond revision the correctness of its rulings by a solemn certificate as to the eminent propriety of all that it has done. And counsel venture to as-

sume that this court will not hesitate to review the entire evidence by reason merely of the fact that the lower tribunal has undertaken to pronounce it adequate to all the exigencies of the prosecution.

A general averment to the effect all the proceedings at the trial were properly and regularly conducted will not take the place of a necessary recital which is omitted, or preclude a reversal for the want of such recital:

Hamilton *vs.* Com., 16 Pa. St., 129.

(*c*) *The Whole Case Open to Revision.*

The sufficiency of the evidence, as a whole, to warrant a conviction demands the consideration of this court.

Although no motion was made to direct a verdict of acquittal, and the sufficiency of the Government's proof to warrant a conviction was not raised at the conclusion of the case, this court will, in a criminal proceeding, examine the record to determine whether the proof is adequate and competent to sustain a verdict of guilty.

In Wiborg *vs.* United States, 163 U. S., 632, 658, no motion or request for acquittal of the defendants had been made at the close of the evidence, and they had been convicted. The judgment was revised, as to two of the defendants, on the ground that there was no evidence to sustain the verdict as against them, the court saying:

> "Although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to the defendants, we feel ourselves at liberty to correct it."

Any substantial error to the prejudice of the accused is ground for reversal, although it may not have been objected to in the trial court.

Hopt *vs.* Utah, 110 U. S., 574.

In Clyatt *vs.* United States, 197 U. S., 207, a criminal case in which no motion for acquittal had been made, and the

accused had been convicted, this court re-examined the evidence as set out in the record, and reversed the judgment upon the ground that the proof was not sufficient to sustain the verdict, the rule in such cases being thus stated by Mr. Justice Brewer:

> "While no motion or request was made that the jury be instructed to find for defendant, and although such a motion is the proper method of presenting the question whether there is evidence to sustain the verdict, yet Wiborg *vs.* United States, 163 U. S., 632, 658, justifies us in examining the question in case a plain error has been committed in a point so vital to the defendant."

> "No technicality, except by the express letter of the law, should ever deprive an accused person of a substantial right."
>
> Allen *vs.* U. S., 52 C. C. A., 597; 115 Fed., 3.

> "If there be no evidence which would justify the submission of a fact to the jury, no exception is necessary for review and reversal."
>
> Benson *vs.* Gurlach, 20 N. Y., 939.

So a Federal question, arising in a case coming from a State court, may be reviewed, although not seasonably raised in the State court.

Mallett *vs.* North Carolina, 181 U. S., 589.
Rwy. Co. *vs.* Elliott, 184 U. S., 530.

The attention of this Court will, accordingly, be solicited to the evidence offered by the prosecution with reference to the question whether any testimony was given tending to show the commission of the offense charged. And it will be submitted, upon the whole case, that the verdict cannot stand, for the want of any proper and sufficient proof upon each of three essential points:

(1) Want of proof that any unlawful contracts were made;

(2) Want of any proof tending to show that Williamson was implicated in the alleged conspiracy or aware of any of the supposedly unlawful transactions; and,

(3) Want of any proof tending to show the commission of any one of the overt acts charged in the indictment.

(2) No Unlawful Contracts Made.

The testimony does not in any degree tend to prove that there was in any of the cases shown any contract or agreement to buy or to sell the lands, or any other unlawful arrangement whatever.

The very utmost that the evidence conduces to prove is that Gesner made it publicly known that he desired to acquire a body of timber land; that to some of the witnesses directly, and to others indirectly, he communicated his willingness to pay as much as $500 for every quarter section that would be offered to him; that to some he offered to lend the necessary money, taking therefor mortgages on the lands; that to others he offered to lend the money and to ask no interest so long as he was permitted to use the land for pasturage; that a number of persons took advantage of Gesner's known willingness to buy such lands and undertook to make entries; and that Gesner, in some cases, advanced the purchase price, as he had offered to do.

In all this there was nothing illegal, or otherwise improper, on the part either of Gesner or of the applicants. The law on this point is perfectly clear and thoroughly settled.

United States *vs.* Budd, 144 U. S., 154, was a bill in equity to vacate a patent issued to Budd upon an entry of timber land under the act of 1878, on the ground that the entry had been made in pursuance of an agreement by Budd to transfer the land to one Montgomery. Budd had, in fact, transferred the land to Montgomery within twenty-four days after the issue of final certificate upon the entry. It appeared also

that within a period of eight months after the date of Budd's entry twenty-one other persons had made under the same act entries of tracts in the same township, and that all of these other persons had, like Budd, conveyed the tracts so entered by them respectively to Montgomery within a few days after their receipt of final certificates, except that in two cases such conveyances were made before the issue of final certificates. In addition to the 3,000 or more acres thus obtained by Montgomery in this township, he had bought other tracts in the immediate neighborhood sufficient to make his holdings so acquired aggregate about 10,000 acres.

The theory of the Government was that these facts were sufficient to warrant the inference that the several entrymen had sought title to the lands for the purpose of conveying to Montgomery, and in pursuance of an agreement with him to that end.

On this point, and upon this evidence, the court said:

> "But surely this amounts to little or nothing. It simply shows that Montgomery wanted to purchase a large body of timber lands, and did purchase them. This was perfectly legitimate, and implies or suggests no wrong. The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the Government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the Government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied.
>
> "Montgomery might lawfully go or send into that vicinity, and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the Government; and any person, knowing of that offer, might rightfully go to the land office and make application and purchase a timber tract from the Government."

To like effect are Olson *vs.* United States, 133 Fed., 849, and Lewis *vs.* Shaw, 70 Fed., 289.

The right to lend and borrow money upon the security of the land, and to mortgage, before issue of patent and final certificate, are well settled, even in the case of entries under statutes such as the homestead and pre-emption laws, which make it unlawful to sell or to agree to sell the land before final proof.

Hafeman *vs.* Gross, 199 U. S., 342.
Stewart *vs.* Powers, 98 Cal., 514.
Towsley *vs.* Johnson, 1 Neb., 95.
Nycum *vs.* McAllister, 33 Iowa, 374.
Lewis *vs.* Wetherell, 36 Minn., 386.
Watson *vs.* Voorhees, 14 Kans., 254.
Christy *vs.* Dana, 34 Cal., 548.
Walterson *vs.* Kirkwood, 8 Kans., 310.
Cheney *vs.* White, 5 Nebr., 261.

That Gesner went no further than to express his desire to buy the lands, and that none of the applicants ever agreed to sell, is manifest from the accounts of the various transactions given by the witnesses for the Government.

The testimony supposed to establish the unlawful contracts has been set out above. If the extracts there copied are not absolutely all that was offered on this point, counsel make bold to say that they express the substance of the evidence respecting the supposed contracts, and that nothing else can be found anywhere in the record which will in the least strengthen the proof of any contract, agreement, or understanding. Let the statements of the several witnesses as to the nature and effect of their dealings with Gesner be briefly restated.

Jones, at the point when he was asked as to his intentions and forced to confess that he had sworn falsely in his application, had certainly not stated any contract for the transfer of the land. Gesner had offered to pay $500 for a tract of

timber land, Jones had said that he would make an entry, and the entry had been made in reliance upon Gesner's promise to buy, all of which was entirely within the limits defined as permissible in the Budd Case. The further testimony of this witness, showing that Gesner was seeking only the grazing privilege and was willing to lend the purchase money without interest for that purpose, is quite inconsistent with the existence of any contract to buy or to sell that was binding upon either party.

Beard stated an offer of Gesner, made through Biggs, to pay $500 for a title, to which offer the witness said that he "might take up a claim for him." When he first communicated with Gesner, he found that the latter's idea was to loan the purchase money and take a mortgage on the land. The witness did not understand that there was any contract or anything more than an understanding, which was evidently merely the understanding that the land could be sold to Gesner. If the witness is to be believed when he says that Gesner asked whether his proposal was satisfactory, even that added incident creates no contract, and imports no more than that everybody understood Gesner's willingness to buy.

Watkins learned through Biggs that Gesner would buy timber land, and to Biggs he expressed his purpose to avail himself of that fact. He borrowed money of Gesner to pay for the land, and secured the loan by a mortgage; but he had no agreement with Gesner for the sale of the land, nor did he suppose that he had, and believed that he was at liberty to sell to anybody else.

Calavan was told that Gesner would buy the land, but that witness would be under no obligation to sell to him. His understanding was that he was to receive $500 when he sold, as it was his intention to do.

Crain had no talk at all with Gesner or Biggs; he acted upon information that Gesner wanted land; he had no agreement or understanding with anybody, as he very well

knew and as he stated to Biggs; and he did not feel even morally bound to sell to Gesner.

Evans received a proposal from Gesner to loan money on a tract of timber land, the privilege of grazing to offset the interest, and was told, not that Gesner would buy, but that the land would be worth $500 to him. Evans did not say that he would or would not sell, but borrowed the money. He expected to sell to Gesner, but did not hold himself bound to do so.

Hudson was told that a claim was worth $500 to Gesner. He did not say that he would sell for that sum, and intended to sell to some one else if he could get a better offer.

Feuerhelm was told that Gesner would pay $500 for a tract of land. He did not say anything at all, but made an application, intending to take advantage of Gesner's willingness to buy. This witness not only did not understand that he had agreed to sell to Gesner, but refused, under the most vigorous pressure, to say that he had any reason to believe that Gesner understood anything of the kind (Rec., 257).

Mrs. Watkins had no communication at all with either of the defendants. Her "understanding" to which she testified was simply her expectation, based upon information, that the land could be sold to Gesner.

Ray heard Gesner say that he would buy land. His "understanding" consisted only in his supposing that his acting upon Gesner's suggestion constituted an agreement (Rec., 597).

Gaylord heard that Gesner wanted land and resolved to profit by that fact. Beyond being introduced to Williamson by a person who said he was good for a claim, Gaylord had no dealings with any of the defendants, and could quite truthfully tell Biggs, as he did, that he had no understanding at all.

Duncan was told that Gesner would pay $500 for a tract, to which statement Duncan expressed no assent, but made an application. He was also told that no contract could be

made, and the "understanding" which was stated as permissible was no more than Gesner's expression of willingness to buy.

In all this testimony there is no suggestion of any contract, agreement or arrangement whereby the entries to be made were to inure to the benefit of Gesner. Gesner communicated to the public the fact that he wished to buy land and was willing to pay for it more money than it would cost to buy it from the Government. This, as is expressly said in the Budd Case, he had the right to do. A number of persons to whom, directly or indirectly, Gesner's desire for land was made known, undertook to avail themselves of the fact by entering land and selling the titles to him. This they also had the right to do, as is declared in the Budd Case.

Not one of these witnesses testifies that he promised Gesner to sell him the land. Most of them said nothing at all in response to the statement of his desire to obtain land. Two or three said they would make entries. Beard, under the private stimulation of the District Attorney, was induced to recall that Gesner had asked the men if his proposal was satisfactory and Beard said it was. But even this did not commit Beard to an agreement to sell to Gesner. It is impossible, upon the most careful search of the record, to find any trace of an agreement between Gesner and any of the witnesses, or anything more than his public offer to buy the lands and their resolve to act upon that offer, obtain the land and sell to him. And this is a thing which this court has declared not to be a contract within the meaning of the statute.

Under such circumstances, it was possible to secure a conviction only by piecing out the proof of the facts with something to be evolved from the minds of the witnesses. And this was accomplished by a confusing play upon words, by which one witness after another was induced to state his "understanding," the effect upon the jury being to per-

suade them that the witness' private interpretation of the transaction was really something in the nature of a contract, additional to the non-contractual acts of the parties.

Every one of these witnesses was, according to the theory of the Government, guilty of perjury and deserving of punishment. There are unmistakable indications that the District Attorney had taken occasion to remind them that they were at his mercy. They were men in humble walks of life, none of them of much learning, and most of them very illiterate, far from home, and all thoroughly persuaded, if not of their own guilt, at any rate of their helplessness. That the court, as well as the District Attorney, considered the transactions criminal and the witnesses guilty of perjury, was also quite clear. The manner in which they were led, or rather driven, by the District Attorney requires no comment from counsel further than to say that this might properly be made the first case in this court of a reversal on account of leading questions.

From such witnesses, standing in the shadow of the penitentiary, the drastic dragooning of the District Attorney was unable to extract more than the fact that some of them believed that they had an understanding with Gesner that they would transfer their titles to him. It was evidently assumed by the court that this understanding was of a criminal character. The jury, of course, agreed with the court, as is manifest from the fact that the defendants could not have been convicted unless the jury had supposed that this understanding rendered the sworn statements perjurous.

What was this understanding, upon which the changes were so persistently rung, and concerning which the witnesses were plied so relentlessly?

Not a contract, evidently; since the witnesses who used the word distinguished it from a contract. They had no contract, only an understanding; it was not agreed that Gesner should buy the land, but merely understood. Not anything by which anybody was legally, or even morally,

bound; since the applicants felt at liberty to sell at the best price obtainable, without regard to Gesner, although each of them had this understanding.

Nor was this understanding a thing which was the result necessarily of negotiation, and it might exist and be entertained in the absence of even a unilateral proposition or statement. Mrs. Watkins, for instance, had never exchanged a word or had any dealings with any one of the defendants until she went before Biggs to swear to her application (Rec., 262, 263). She had heard Mr. Williamson say, "Now we are in about the middle of the section, and the timber is about the same all over;" and she had seen him write some numbers in her husband's notebook (Rec., 261). Crain, also, had neither said anything to either of the defendants, nor had he heard from them, or seen any one of them do anything more than Mrs. Watkins had heard and seen (Rec., 182). All the information that either of these witnesses had was received from Watkins, and whatever intention or understanding was in the mind of either was based solely on that information. Yet Mrs. Watkins, upon being asked as to her intention, says, "Well, my understanding was that it was to go to Williamson and Gesner" (Rec., 262).

Likewise, Crain had an understanding to the same effect (Rec., 184); and to a greater or less extent, and with more or less clearness, it appears that the understanding of all the other witnesses was a thing of substantially the same nature.

In the cases of Crain and Mrs. Watkins, it is manifest that the so-called understanding was merely an intention in the mind of the witness to sell the land to Gesner and an expectation that he would buy. The testimony of the other witnesses shows that they all used the word in this sense. This expectation was based upon Gesner's known desire to buy land and his expressed willingness to pay $500 for each tract, and there was nothing more than this expectation. There was no agreement to sell, no acceptance of any proposal, and in some cases not even a direct statement by Gesner of his

disposition to take the land. But there was in the mind of each witness a confident belief, which he called an understanding, that Gesner was a prospective purchaser, and a more or less definite intention to sell to him; and because Gesner had announced that he would buy, and because the applicants intended to take advantage of that offer, they understood that the transfer was to be made, and considered that, in that sense, they had an understanding with him on the subject.

That is precisely the case stated in United States *vs.* Budd as a permissible and innocent transaction. A man gives it out in the community that he will pay for timber land more than it costs to buy it from the Government. Other persons, to whom this offer has been communicated, enter the lands, acting upon that promise, being induced thereby, and intending to sell to the man who made it. The offer to buy on the one side, and the acceptance of it on the other, do not vitiate the transaction or affect either party with any guilt.

If there was anything more in the present case, the most searching inquiry and most vigorous pressure of the prosecution failed to bring it out.

It was not even shown that any one of the applicants ever communicated to Gesner his intention to let him have the land, or that Gesner in any way shared the understanding of which so frequent mention was made. Even if Gesner had known that these persons expected to sell to him, it would not have affected the case, so long as there was no more than Gesner's expressed desire to buy and the expressed purpose of the other party to sell. But of that there is no mention.

It is clear that the whole strength of the prosecution lay in the belief of the witnesses that they had violated the law by making entries on account of Gesner's avowed desire to buy land and with the intention of taking advantage of it. How this belief was impressed upon them is perhaps not so

clear; but by playing upon the guilty consciences of the applicants the Government made it appear to the jury that the defendants must have shared their supposed guilt. The witnesses were made to confess crime upon facts which were entirely innocent, and perjury in statements which in view of those facts were perfectly truthful.

If the facts stated by these witnesses did not create unlawful contracts, no perjury was committed by anybody. If those facts did not constitute an illicit transaction, the understanding of the applicants did not make one. If these persons did not commit perjury, the defendants did not suborn perjury. If the evidence does not show subornation of perjury, there is no evidence of conspiracy, because the fact of conspiracy was attempted to be proved only by backward inference from the supposed subornation, and that by like inference from the supposed perjury.

It results that there was no evidence to show the defendants guilty of any offense, and for that reason the verdict can not be sustained.

(3) Connection of Plaintiff in Error with the Conspiracy.

Mr. Williamson had been resident since 1900 at The Dalles, about 100 miles from Prineville. In June, 1902, he was nominated as a candidate for the office of Representative in Congress. For several months before that date he had given his entire attention to procuring the nomination, and for at least six weeks thereafter he was engrossed in pressing his candidacy. He visited Crook County for periods of a few days in April, June, July, and November or December. (Rec., 469-472). He was informed that Gesner was making loans on timber lands, but swears that he did not know of any negotiations for the purchase of such lands (Rec., 478), in which statement he is corroborated by Gesner (Rec., 395, 403).

It appears that plaintiff in error and his wife, in the summer of 1902, made entries under the act of 1878. It is not suggested that in these entries there was any impropriety, or that they involved or contemplated any subornation of perjury or the employment or intervention of other persons than the applicants themselves. Some attempt, indeed, was made to prove that the lands entered were not properly subject to entry under the act, because not chiefly valuable for timber. This evidence, if competent and credible, might afford ground to prosecute the parties for perjury; but it cannot, by any stretch of logical principles, tend to prove that Williamson conspired with other persons to procure the commission of perjury in respect of other lands.

Only four facts were shown by the testimony for the prosecution which could possibly show any connection of Williamson with the alleged conspiracy, or from which might be inferred any possible acquaintance on his part with the supposed unlawful enterprise of Gesner.

In June, 1902, before the applications were made for the lands, Mr. Williamson and Dr. Gesner were one day sitting in front of a hotel at Prineville when Gesner called across the street to the witness Hudson. Upon Hudson's coming over, Gesner proposed that he take a timber claim, saying that he, Gesner, would pay $500 for the title (Rec., 221). Williamson was sitting at some distance; he took no part in the conversation, and it does not appear that he heard any of it (Rec., 231, 240).

Watkins, upon going to the clipping corral with his wife, Crain and his wife, and Gaylord, found Williamson there with Gesner and some other persons who were in the employ of the firm (Rec., 137). Williamson told the intending applicants that they were in the middle of a certain section, wrote the number of the section in a memorandum book of Watkins, and told them they "could go and file on it." Watkins, in introducing Gaylord to Williamson, said that Gaylord "wanted to take a claim, too" and "would be all right for one" (Rec., 137, 648, 649, 262).

According to Gesner's account of this occasion, it was he who undertook to write the numbers in Watkins' book, and Williamson offered to do it on the ground that Gesner's writing was illegible "after it got cold" (Rec., 407). Williamson has a faint recollection to the same effect (Rec., 483).

This occurred in June, 1902.

In the following December Crain and Gaylord, having relinquished their applications, called upon Dr. Gesner at his office and found Williamson there. He heard their conversation with Gesner, which was about their timber-land claims, and made some comment to the effect that, on account of the unfavorable disposition of the Secretary of the Interior, it was unsafe to proceed with such cases, but it might be possible at a later time to complete the entries (Rec., 185, 186, 651).

On another occasion, at about the same time, Duncan called upon Gesner at his office, and was there introduced to Williamson. The latter showed Duncan a newspaper article giving an account of Secretary Hitchcock's views and purposes respecting fraudulent land entries (Rec., 547, 548), and Gesner suggested to the witness that he had better relinquish his entry, as "Hitchcock was mad" (Rec., 547).

On the first of these occasions, even if it appeared that plaintiff in error heard the conversation between Gesner and Hudson, the fact of his listening to a matter which concerned only those persons could not warrant any inference that the third party was, or expected to be, concerned in the proposed transaction, or that he even approved of it.

At the clipping corral, the mere presence of Williamson on his own land, at his own place of business, in the company of his partner, would not justify the assumption that he was cognizant or approved of any unlawful enterprise of his partners, which was foreign to the business of the partnership, and the existence and character of which do not appear to have been stated in his presence. The writing of

the numbers in the book of Watkins was, at the worst, a gratuitous personal accommodation to relieve Gesner, undertaken in a jocose spirit because of Gesner's supposed bad penmanship. The statement to the intending applicants as to the location of the land was, likewise, such a piece of kindly advice as any man might give to his neighbor who contemplated making an entry.

The interviews testified to as taking place at Gesner's office occurred six months after the alleged subornation and commission of perjury, after the unlawful scheme stated in the indictment had been fully completed, and after the alleged unlawful enterprise had been abandoned. The witnesses, as affirmatively appears, had come to the office to find Gesner, and not expecting or wishing to see Williamson, and they addressed themselves to the former and transacted their business with him. After the relinquishment of the claims had been settled, and as an incident of the conversation which he had overheard, Williamson made some remarks, of an apparently impersonal character, in the nature of comment upon the advisability in general of pressing claims under the public-land laws. The activity of the Secretary of the Interior in exposing fraudulent claims, and the hostility of the Department to timber-land entries, were, it appears, the subject of ordinary local gossip and newspaper comment (Rec., 547, 548). The article in the "Oregonian" which Williamson, on these occasions, read or showed to these witnesses, was manifestly sufficient to provoke conversation in the community, and amply sufficient to occasion the remarks and to justify the advice attributed to the plaintiff in error.

All that is proved that touches the plaintiff in error is that on four occasions he was seen in the company of his partner, once in a public place, once on his own land, and twice at his partner's office, and on none of these occasions is any knowledge of his partner's alleged misdeeds brought home to him. It is possible that at any or all of these times

he may have known of that supposed wrongdoing, but it is equally possible that he did not. All that is shown is as consistent with the theory of Williamson's innocence as with that of his guilt. No act of his appears to have been done in pursuance of any purpose to acquire timber land, or with any necessary or probable reference to any such scheme as is outlined in the indictment.

Upon such proof the case as to Williamson should never have been allowed to go to the jury. The facts proven as to him indicated his innocence with at least equal probability as his guilt, and no jury could be justified in an inference of crime from such facts.

In the Wiborg Case, *supra,* a judgment of conviction against two of the persons indicted was reversed because there was no evidence affirmatively showing on their part any guilty knowledge or any participation in the alleged criminal enterprise, and the third defendant, who alone was active in the enterprise, by his testimony exculpated them from any such knowledge. It is submitted that the present case is fairly within that precedent; and is pre-eminently one for the application of the same rule.

(4) No Proof of Overt Acts.

The indictment charges nineteen overt acts as done by one of the alleged conspirators in pursuance and furtherance of the supposed unlawful scheme. It is alleged that Biggs "unlawfully did prepare a certain sworn statement" for each of nineteen persons, who are named in as many paragraphs, and who are said to be some of the persons intended to be suborned (Rec., 4-10).

The sworn statement intended is set out *in extenso* on page 4, of the Record, and appears to be such a statement as is required by section 2 of the act of 1878, and which is made by filling in, upon blank forms printed by the Department of the Interior, the names, dates and descriptions

necessary to make the statement apply to a particular case of application to enter under the act.

There is evidence that several of the persons named in the indictment appeared before Biggs and swore to such statements, after the statements had been made out and completed by the insertion therein of the necessary data above indicated. It appears also that Biggs, in each of these cases, affixed to the jurat his signature, by way of certifying, as United States commissioner, to the fact that the applicant had made the requisite oath.

But there is no proof that Biggs had anything whatever to do with the preparation of any of these papers. The witnesses who testify to their taking of oaths before Biggs do not say or intimate that he, or anyone else, wrote in the names and other matters necessary to prepare the blank forms for use, or did anything in the premises beyond attaching his own signature. For aught that appears in the testimony, the statements completely prepared and ready for execution may have dropped from the skies, or, what is more probable, had been filled in and made out by the applicants themselves before going before the officer to take the oaths.

An averment that Biggs prepared these papers is not supported by proof that he certified to their due execution. The attestation of a jurat is not the preparation of an affidavit or other sworn document, and does not even warrant the inference that the attesting officer had anything to do with the fabrication of the document or was aware of its nature and contents. In point of fact, such papers are usually prepared by other persons than the officer before whom they are sworn to, and are prepared before the officer sees them. The addition of the official signature is not an element of the preparation, but something which follows the completion of the instrument.

Upon an indictment for conspiracy, some overt act must be alleged as done in furtherance of the alleged unlawful scheme, and it is necessary to prove at least one of the overt

acts alleged. Proof of other acts, however numerous and however calculated to further the purpose of the conspiracy, will not excuse the prosecution from proving the particular act or acts which are assigned in the indictment, and of which notice is communicated to the defendants.

Bannon *vs.* United States, 156 U. S., 468.
United States *vs.* Smith, 2 Bond, 323.
People *vs.* Chase, 16 Barb., 195.

Upon the ground alone that no attempt was made to prove the preparation by Biggs of the papers described in the indictment, the verdict should be held unwarranted by the evidence.

As has been pointed out (*supra*), the instruction given to the jury on this point in effect dispensed with the necessity for proof of any of the overt acts charged in the indictment, and directed the jury to convict if they found that any one of the defendants had done any act whatever in execution of the supposed unlawful scheme. The error of the charge in this respect is the subject of one of the exceptions (Rec., 694).

IV.

The Constitutional Privilege.

Before the court passed sentence upon plaintiff in error, he objected to the pronouncing of sentence upon him, and especially to the pronouncing of a sentence of imprisonment, on the ground that such sentence would interfere with his attendance upon the sessions of Congress, and would interfere with his going to and returning from such sessions, and would deprive him of the privileges and immunities guaranteed to him, as a member of Congress, by the Constitution of the United States, to be free from arrest and imprisonment during his attendance at the sessions of Con-

gress and in going to and returning from the same. The court overruled the objection, and passed sentence on the plaintiff in error, directing that he pay a fine of $500, and be imprisoned for a term of ten months. Plaintiff in error excepted to the action of the court in overruling his objection and in passing sentence of imprisonment upon him (Rec., 705, 706).

By the Constitution of the United States, in Article I, Section 6, it is, *inter alia*, provided, with reference to Senators and Representatives in the Federal Congress:

> "They shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."

Felonies, in the sense of the Constitution and of Federal statutes, are only such offenses as were felonies at common law or are by statute declared to be felonies:

Reagan *vs.* U. S., 157 U. S., 301.
Bannon *vs.* U. S., 156 U. S., 464.

Conspiracy was a misdemeanor at common law, and is so under Federal statutes, the fact that it is an infamous offense not making it a felony:

Bannon *vs.* U. S., *supra.*
Mackin *vs.* U. S., 117 U. S., 348.
Ex parte Wilson, 114 U. S., 417.

The phrase "breach of the peace" means only actual breaches of the peace, offenses involving violence or public disturbance. In cases of other misdemeanors, the parliamentary privilege applies, as in libel:

Rex *vs.* Wilkes, 2 Wilson, 151.
Ware *vs.* Circuit Judge, 75 Mich., 488.
Estes *vs.* State, 2 Humphrey, 496.

According to the weight of authority, the privilege of members of Congress extends even to immunity from service of process in civil actions:

Holliday *vs.* Pitt, 2 Strange, 985.
Barnard *vs.* Mordaunt, 1 Kenyon, 125.
1 Tidd's Practice, 196.
Miner *vs.* Markham, 28 Fed., 387.
Bank *vs.* McSpeddan, 5 Biss., 64.
Nones *vs.* Edsall, 1 Wall., Jr., 189.
Lyell *vs.* Goodwin, 4 McLean, 29.
Bolton *vs.* Martin, 1 Dall., 296.

The plaintiff in error was a Representative in the Fifty-eighth and also in the Fifty-ninth Congress, his terms of service extending from March 3, 1903, to March 3, 1907.

At the date on which this indictment was brought, in February, 1905, Congress was in session, and the plaintiff presumably in attendance thereon.

In October, 1905, the plaintiff in error was sentenced to be imprisoned for a period of ten months—a term which, had the sentence become effective immediately, would have covered the whole of the next ensuing session of Congress, and which, had it been put in execution at any time within seven months thereafter, would have precluded the plaintiff in error from attending the second session of the Fifty-ninth Congress. Had this judgment been affirmed at any time within sixteen months from its date, execution thereof would have been, to a greater or less extent, inconsistent with the discharge of his public duties by the plaintiff in error.

The constitutional immunity from arrest includes immunity from imprisonment, save in the cases excepted. The arrest is prohibited, not because a mere arrest is likely to impair the discharge of legislative duty, but because it implies and leads to imprisonment which does have that effect.

Upon the same principle, the trial of a Member of Congress, during the period for which he is elected, is within the constitutional prohibition. The purpose of the immunity is to enable the Representative to devote his whole time and attention to the public service, without interruption or distraction by reason of his private concerns. The privilege is established, not in the interest of the Member of Congress, but for the benefit of those whom he represents. It is obvious that a trial upon a charge of infamous crime must necessarily distract the attention of the defendant from his public duties and impair his efficiency as a public servant.

In this view of the matter, it is nothing to the purpose to suggest that a Member of Congress may be put upon trial and convicted, and that execution of sentence may be deferred until after the expiration of the term for which he is elected. The knowledge of a grave charge of crime, the necessity of preparing for and attending a trial of supreme personal moment, and the pendency of a serious sentence cannot fail to operate to the detriment of the Representative and of his constituents.

The trial and sentence of the plaintiff in error were, therefore, in breach of his constitutional immunity, and on this ground the judgment should be reversed.

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Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

JOHN NEWTON WILLIAMSON, PLAINTIFF in error, v. THE UNITED STATES. } No. 96.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

Plaintiff in error was indicted February 11, 1905, in the United States Circuit Court for the District of Oregon, together with two other persons, Van Gesner and Marion R. Biggs, for conspiracy to commit an offense against the United States, in violation of section 5440, Revised Statutes.

At the time the indictment was found and until March 4, 1907, Williamson was a member of the House of Representatives of the United States. His term of office expired on that date and he was not reelected.

The indictment read (Rec., 35):

> The grand jurors of the United States of America, inquiring for the District of Oregon,

upon their oath present, that John Newton Williamson, Van Gesner, and Marion R. Biggs, late of the city of Prineville, in the district aforesaid, on the thirtieth day of June, in the year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did conspire, combine, confederate, and agree, together, and with divers other persons to the said grand jurors unknown, to commit an offense against the said United States; that is to say, to unlawfully, willfully, and corruptly suborn, instigate, and procure a large number of persons, to wit, one hundred persons, to commit the offense of perjury in the said district by taking their oaths there, respectively, before a competent officer and person in cases in which a law of the said United States authorized an oath to be administered; that they would declare and depose truly that certain declarations and depositions by them to be subscribed were true, and by thereupon, contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be true; that is to say, to suborn, instigate, and procure the said persons, respectively, to come in person before him, the said Marion R. Biggs, who was then and there a United States commissioner for the said District of Oregon; and, after being duly sworn by and before him the said Marion R. Biggs, as such United States commissioner, to state and subscribe under their oaths that certain public lands of the said United States, lying in Cook County, in said

District of Oregon, open to entry and purchase under the acts of Congress approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons, respectively, and that they had not directly or indirectly made any agreement or contract in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit, respectively, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, by which the titles which they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, as copartners in the firm of Williamson & Gesner, then and before then engaged in the business of sheep raising in said county; the matters

so to be stated, subscribed, and sworn by the said persons being material matters under the circumstances, and matters which the said persons so to be suborned, instigated, and procured, and the said John Newton Williamson, Van Gesner, and Marion R. Biggs would not believe to be true; and the said Marion R. Biggs, United States commissioner as aforesaid, when administering such oaths to those persons, being an officer and person authorized by law of the said United States to administer the same oaths, and the said oaths being oaths administered in cases where a law of the said United States would then authorize an oath to be administered.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the thirtieth day of June, in the same year of our Lord nineteen hundred and two, at Prineville aforesaid, in the said district, unlawfully did prepare a certain paper, called a sworn statement, for the signature of one Campbell A. Duncan, who was one of the persons who were to be suborned, instigated, and procured as aforesaid, that is to say, a paper of the tenor following:

TIMBER AND STONE LANDS—SWORN STATEMENT.

LAND OFFICE AT THE DALLES,
Oregon, June 30th, 1902.

I, Campbell A. Duncan, of Prineville, county of Crook, State of Oregon, desiring to avail

myself of the provisions of the act of Congress of June 3, 1878, entitled "An act for the sale of timber in the States of California, Oregon, Nevada, and Washington Territory," as extended to all the public-land States by act of August 4, 1892, for the purchase of the S. 2 of N. E. 4 and S. 2 of N. W. 4 of section 14, township 15 S. of range 18 E., W. M., in the district of lands subject at The Dalles, Oregon, do solemnly swear that I am a native citizen of the United States, of the age of 34, and by occupation farmer, that I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements * * * nor, as I verily believe, any valuable deposits of gold, silver, cinnabar, copper, or coal; that the land contains no salt spring or deposit of salt in any form sufficient to render it valuable therefor; that I have made no other application under said act; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself, and that my post-office address is Prineville, Oreg.

_____,

Applicant.

STATE OF OREGON, *County of Crook, ss:*

——— ——— do hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily indentified before me by ———) and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this —— day of ———, 1902.

Eighteen other similar overt acts on the part of Biggs in pursuance of said unlawful conspiracy, in the preparation of other like sworn statements for the signature of others of the persons who were to be suborned, in reference to other lands applied for by them, were set out in the indictment (Rec., 5–10).

February 11, 1905, the date the indictment was returned, the defendants were ordered to be admitted to bail (Rec., 11–12). As will be shown later, the defendant Williamson was never arrested and was not put under bond until after conviction.

April 15, 1905, the defendants were arraigned and the defendant Williamson filed a demurrer to the indictment (R., 12–14).

June 26, 1905, Williamson's demurrer was overruled, and the trial set for July 3, 1905 (Rec., 15, 16).

July 7, 1905, each of the defendants pleaded not guilty (Rec., 15–16).

August 28, 1905, an order was entered continuing the trial of the cause until September 5, 1905 (Rec., 16).

September 5, 1905, the trial of the defendants began with the empaneling of a jury, and was continued from day to day (Rec., 19–30).

September 27, 1905, the jury returned a verdict of guilty as to all of the defendants, recommending them to the leniency of the court on account of previous good character (Rec., 30–31).

October 7, 1905, separate motions for a new trial and an arrest of judgment were filed by the defendant Williamson (Rec., 32, 33).

October 14, 1905, the motions of the several defendants for a new trial and in arrest of judgment were overruled and judgment upon the verdict entered, against the objection of the defendants, the court sentencing the defendant Williamson to pay a fine of $500 and be imprisoned for a term of ten months, Van Gesner to pay a fine of $1,000 and be imprisoned for a term of five months, and Biggs to pay a fine of $500 and be imprisoned for a term of ten months (Rec., 34).

The defendants thereupon asked for a stay of execution in order to prepare and file a petition for an appeal to this court and their assignments of error and supersedeas bonds, and it was ordered that execution of the judgment be stayed until further order of the court (Rec., 34).

April 12, 1906, Williamson filed his petition for a writ of error from this court, together with his assignments of error and supersedeas bond (Rec., 35, 36, 66); and on the same day the court granted the

petition, approved the bond, and ordered that sentence and execution be stayed until the final disposition of the writ of error in this court (Rec., 68). The writ of error issued the same date (Rec., 1).

The bill of exceptions contains this statement (Rec., 705–706):

> And be it further remembered, that after the verdict in said cause, and when the court was about to pronounce sentence upon the defendant, the said defendant, John Newton Williamson, objected and protested against the court passing sentence upon him, and especially to any sentence of imprisonment, on the ground that such sentence would necessarily interfere with his going to and coming from the sessions of Congress during his term and from his attendance thereon as Member of such Congress of the United States, and would be in violation of his constitutional privilege and immunity of freedom from arrest while going to and coming from and attending such sessions; but the court overruled and denied said objection and proceeded to pass sentence upon said defendant as otherwise shown by the record herein; and the said defendant, John Newton Williamson, then and there excepted to said ruling of the court denying and overruling said objection and to the sentence of the court providing for his imprisonment in said cause, and his said exceptions were allowed.

The bill of exceptions also states (Rec., 706):

> Be it further remembered, that said defendant, John Newton Williamson, appeared for

> trial in said cause without arrest and without compulsion or other process. A verbal notice was given to him by the honorable district attorney that he would be expected and required to appear for trial at a certain time stated therein. He was never put under bond until after conviction.

After suing out the writ of error from this court the defendant Williamson also sued out a writ of error from the Circuit Court of Appeals for the Ninth Circuit, along with the other defendants, Van Gesner and Biggs. In the Circuit Court of Appeals counsel for plaintiffs in error made this statement (*Van Gesner* v. *United States*, 153 Fed., 46, 48):

> Prior to the writ of error in this case, the defendant Williamson, who was a Representative in Congress, had sued out a writ of error to the Supreme Court of the United States, based upon the holding of that court in the Burton case, that a sentence of imprisonment against a Member of Congress involved a constitutional question, giving the right of appeal direct to that court. At the time the writ of error was sued out in this case the constitutional question in the Burton case had never been decided. This writ of error to this court in the Williamson case was sued out after the writ to the Supreme Court, and out of abundance of caution in case the writ to the United States Supreme Court should be dismissed upon jurisdictional grounds. The jurisdiction of this court, therefore, in the Williamson case, depends upon whether the United States Supreme Court shall entertain jurisdiction

> thereof, and, if it holds that it has jurisdiction to pass upon the merits, then the proceedings in this court necessarily fail. If the Supreme Court should take jurisdiction in the Williamson case and pass upon the merits, its decision will necessarily be controlling in all these cases, as the record and questions presented (except the constitutional one) are identical.

After quoting this statement, the Circuit Court of Appeals said (*Id.*):

> Upon this statement of counsel for the plaintiff in error we are of the opinion that the writ in respect to the plaintiff in error Williamson must be and hereby is dismissed. He was put to his election whether he would appeal from the judgment given against him directly to the Supreme Court upon the question of jurisdiction alone, or bring the whole case to this court, in which event this court could, if it deemed proper, certify the question of jurisdiction to the Supreme Court, or the case be taken there by that court by its writ of certiorari. (*Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S., 397–407, 24 Sup. Ct., 376, 48 L. Ed., 496; *McLish* v. *Roff*, 141 U. S., 661–667, 12 Sup. Ct., 118, 35 L. Ed., 893.)

The Circuit Court of Appeals affirmed the judgment of the Circuit Court in the cases of Van Gesner and Biggs (153 Fed., 46), and on May 20, 1907, we are advised, denied their petition for a rehearing.

STATUTES.

SECTIONS OF REVISED STATUTES.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

SEC. 5393. Every person who procures another to commit any perjury is guilty of subornation of perjury, and punishable as in the preceding section prescribed.

SEC. 5440. (As amended 1879.) If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be

liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court.

TIMBER AND STONE ACT.

(Approved June 3, 1878, 20 Stat., 89.)

CHAP. 151.—AN ACT for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the States of California, Oregon, and Nevada and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided,* That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands

for internal improvements, education, or other purposes: *And provided further*, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indi-

rectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself, which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required;

secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

* * * * *

ARGUMENT.

The writ of error should be dismissed for want of jurisdiction.

This case was brought here upon the assumption that the objection made by the defendant to the imposition of sentence raised a constitutional question.

It is submitted that there is not now and never has been, properly speaking, a constitutional question involved in this case.

The mere assertion of a constitutional privilege, without color of ground to support it, is not sufficient to confer jurisdiction on this court to review the judgment of the Circuit Court. "The claim must be real and substantial. A mere claim in words is not enough." (*Lampasas* v. *Bell*, 180 U. S., 282.)

The constitutional question sought to be raised in this case is based upon the assumption that the privilege of a Senator or Representative from arrest not only includes sentence in a criminal prosecution, *but continues the entire year round, although expressly limited to certain specific occasions.*

Article 1, section 6, clause 1, of the Constitution provides:

> They [Senators and Representatives] shall in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same.

See also Newburyport Water Co. v. Newburyport, 193 U. S. 561, 576;
American Railroad Co. v. Castro, 204 U. S. 453, 455;
Kent v. People of Porto Rico, decided Nov. 18, 1907.

Assuming that the offense of which the plaintiff in error was convicted is not included within the exception "treason, felony, and breach of the peace," and that the imposition of sentence in such a case would amount to an arrest, it is clear that color for the assertion of such privilege exists only when a Senator or Representative is threatened with arrest while in attendance at the session of their respective Houses or in going to and returning from the same.

In the present case plaintiff in error sought to assert his privilege (assuming that sentence was an arrest) when Congress was not in session, and when he was not going to or returning from the same. The court will take judicial notice of the fact that Congress did not convene until December 4, 1905 (34 Stat., 1), and the defendant's objection was made and sentence imposed on October 14, 1905, nearly two months prior thereto.

The frivolousness of such claim is manifest. It is not to be confounded with that made in the Burton case (196 U. S., 283). There, as the record therein shows, Burton, in his motion in arrest of judgment filed March 29, 1904, contended:

> Fourthly: The privilege of freedom from arrest granted to the defendant during the session of the Senate of the United States is not merely a personal privilege, but is a prohibition against arrest or judicial proceedings against a Member of the Senate of the United States *during a session of the Senate* which can not be waived by such Member.

This motion was overruled and judgment imposed on April 6, 1904. The Senate was in session during the whole of Burton's trial and until April 28, 1904.

It was under these circumstances that the court held that the constitutional question raised in that case was not frivolous.

In the second Burton case (202 U. S., 344), the trial, as the record therein shows, began November 20, 1905, the verdict was returned November 25, 1905, and judgment imposed November 29, 1905. Congress met December 4, 1905 (34 Stat., 1). In the motion in arrest of judgment, filed on the latter date, it was contended:

> 5. The privilege of freedom from arrest granted to the defendant during the sessions of the Senate and in going to and returning from the same is not merely a personal privilege, but is a prohibition against arrest of or judicial proceedings against a Member *during a session of the Senate and for a reasonable period for going to and returning from the same*, which cannot be waived by such Member.

In this court, however, as appears from the brief of counsel for Burton, this contention was abandoned, the jurisdiction of the court being rested upon other constitutional questions, among others the validity of section 1782, Revised Statutes, upon which the indictment was founded. In its opinion this court took no notice of the question of privilege although the liberty of a Senator was involved.

Whatever may be thought of the claims made in those cases as to the extent of the constitutional privilege, when, as here, a Member of Congress contends that his privilege extends to freedom from arrest (assuming that the imposition of sentence in a judicial proceeding would be an arrest) two months before Congress will meet, his claim is certainly reduced to the point of frivolousness, and could have been made for jurisdictional purposes only. The frivolous nature of the claim made in this case is further evidenced by the fact that plaintiff in error objected to the imposition of any sentence whatever, although imprisonment might have been no part of it.

Sentence is not an Arrest.

The assumption that sentence is an arrest is itself untenable. At most sentence is but an order for arrest, although almost universally in this country it is followed by a warrant of commitment. (Bishop's New Crim. Proced., 4th ed., sec. 1337.)

An unexecuted order for arrest is not in itself an arrest, and in this case the sentence, even treating it as such an order, was suspended during the entire time that plaintiff in error was a Member of Congress.

*

The Question of Privilege is in any Event a Mere Abstraction.

Williamson's term of office expired March 4, 1907, and he was not reelected. He has no constitutional privilege, therefore, to be interfered with by the exe-

* If there was any arrest in this case, actual or constructive, it occurred when the trial commenced and Williamson's presence became necessary, several months before Congress met.

cution of the sentence. Whether the sentence, if it had been executed at once, would have interfered with his privilege as a Member of Congress is a mere abstraction. It was not executed, but, on the contrary, was suspended during the whole period of his membership in Congress. It is immaterial why it was suspended. Under these circumstances further discussion of the matter seems unnecessary. Out of abundant caution, however, we give the result of our investigation as to the scope of the privilege.

Scope of the Constitutional Privilege.

An examination of the authorities, English and American, leads to the conclusion that the privilege extends to arrests in civil cases only—certainly that it does not apply in the case of any indictable offense.

Hatsell's Precedents of Proceedings in the House of Commons, volume 1, contains an exhaustive treatise on the "Privilege of Parliament."

Among the earliest traces of the privilege in England the author gives the following:

> Sir Henry Spelman, in his Glossary, under title *Gemotum*, which he explains to be *Conventicus Publicus*, cites a law of King Canute, ch. 107, "Omnis Homo pacem habeat, eundo ad Gemotum, et redeundo a Gemoto." Every man shall have peace (be unmolested) going to the Gemote and returning from the Gemote. (Hatsell's Precedents, vol. 1, p. 2, note.)

The same author (p. 40, note) says that on the 14th of December, 1621, the lord privy seal reported

in the House of Lords, from the committee on privileges, their opinion:

> (1) That the privilege of the nobility doth clearly extend to all their menial servants and those of their family, as also to those employed necessarily and properly about their estates as well as their persons.
>
> (2) That the freedom from arrests doth continue twenty days before and after every session; in which time the Lords may conveniently go home to their houses in the most remote parts of this Kingdom.

On May 28, 1624, these resolutions were read and ordered to be observed accordingly with this alteration:

> This freedom to begin with the date of the writ of summons; and to continue twenty days after every session of Parliament (Id.).

After this resolution there appears on the journal an entry to the effect that it is desired by the House that the Lords shall not pervert this privilege to the public injustice of the Kingdom, so that everyone ought rather to go far within, than any way exceed, the due limits. (Id., p. 65, note.)

On the roll of Parliament, 8 Ed. II, is found the following:

> "Rex mandavit justiciaris suis ad assisas, 'jurat,' &c. capiend. 'Assignat' quod supersedeant captioni eorundem ubi comites, barones et alii summoniti ad Parliamentum regis sunt partes, quamdiu dictum Parliam. duraverit," which may be rendered: "That upon any

> capias to receive judgment where it was set forth that the barons and others summoned to Parliament are the associates (partes) of His Majesty, the King directs his justices at assize to forbear to arrest them in time of Parliament." (Id., vol. 1, p. 291.)

The House of Lords, by resolution of April 18, 1626, expressed their privilege thus:

> *Resolved, nemine dissentiente,* That no Lord of Parliament, sitting in Parliament, or within the usual time of privilege of Parliament, is to be imprisoned or restrained without sentence or order of the House, unless it be for treason, felony, or for refusing to give surety for the peace. (Id., vol. 1, p. 66, note.)

The Bill of Rights of 1689 contained the additional branch of privilege, thus:

> That freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. (Stubbs, Select Charters of Constitutional History, 2d ed.; Oxford, Clarendon Press, pp. 523–525.)

Such were the precedents for the provision in the Articles of Confederation, which provided (Art. V):

> Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments during the time of their coming to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

The next and last step in the evolution of the privilege was the adoption of section 6, clause 1, Article 1, of the Constitution.

The exceptions—treason, felony, and breach of the peace—have been held to cover the entire domain of criminal prosecution.

Hatsell (vol. 1, p. 66) says:

> Thirdly. No case has occurred where the suit or prosecution against the person claiming privilege has been for any other than a civil cause, "transgressionis debiti, computis conventionis, aut alterius contractus cujuscunque." Indeed, in Lark's case in the year 1430, the Commons stated their privilege to be free from arrests except for treason, felony, or surety of the peace.

After a review of all the cases, Hatsell says (p. 153):

> It does not appear that, among these complaints of breaches of privilege by the imprisonment of members or their servants, there is any one of a person committed by any process of a court of law or any proceeding by indictment or information in order to bring to trial; or on any capias to receive judgment, and yet in the course of five and twenty years it is but reasonable to suppose that such an event must have happened.

In *Wilkinson* v. *Boulton* (1 Levinz, 163) the defendant was charged with trespass and imprisoned for forcibly taking an orphan out of the custody of the mayor and alderman, which the court held to be criminal in its nature. There was a plea of privilege from commit-

ment, but it was held that a peer was not privileged in such a case, that is, a criminal case.

Lord Cochrane was indicted and convicted for conspiracy on June 21, 1815, and committed to prison. The object of the conspiracy does not appear. He escaped and attended the House of Commons. The marshal of the King's Bench entered the chamber and carried his Lordship away to the prison from which he had escaped, notwithstanding his remonstrance that the marshal had no right to take him. A committee of the House was appointed to consider whether the marshal, in the execution of what he conceived to be his duty, had been guilty of a breach of the privilege of the House. The committee found that no privilege of Parliament had been violated. (1 Hatsell, 278.)

In *Mr. Long Wellesley's case* (2 Russell & Mylne, 639, 664–665), High Court of Chancery, Lord Brougham rendered an exhaustive opinion upon the privilege of Parliament. That was a case of contempt which the court adjudged to be criminal, and as to which, therefore, the privilege was denied. Lord Brougham said:

> If in the Court of King's Bench a member of Parliament should so far forget his honor as a representative, and his duty as a man, as to prevaricate grossly on his oath, was it ever dreamt he would be at liberty to say, "True, I have prevaricated; but I am a knight of the shire, I am a citizen, or I am a burgess in Parliament; true it is, I have done that which degrades and disgraces me, that which is the most flagrant attempt that can be made to

defeat the administration of justice; true it is, I have done that for committing which any other man would have been hurried from hence to a dungeon; but I am a member of the House of Commons; I have privilege of Parliament; and my person is as sacred as the oath which I have taken and broken." Were any man so ill advised as to offer such an insult to the court, far from operating to his protection under this privilege, it is my firm belief, it is my fervent hope, that it would make him cease to be a member of Parliament by expulsion. But it is also my belief that it would, in the first instance, be visited with condign punishment by the court whose dignity had been outraged; and that, long before the House which he had disgraced had thrust him forth, the court would vindicate its insulted honor, and reject with scorn the plea of privilege by which he had aggravated his offence.

The line, then, which I draw is this: *That against all civil process privilege protects;* but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not; that he who has privilege of Parliament in all civil matters, matters which whatever be the form are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege.

In *Rawlins* v. *Ellis* (The Jurist, vol. 10, pt. 1, p. 1039) it is declared that the exception in the 29 Car.

2, c. 7, s. 6, that process may be executed on the Lord's day in cases of treason, felony, or breach of the peace, extends to all indictable offenses, and is not restricted to treason, felony, and such misdemeanors as involve an actual breach of the peace. Said Alderson, B. (p. 1040):

> We need not hear the defendant's counsel in this case. I look on the words "treason, felony, and breach of the peace" in this statute to mean all indictable offenses.

The law is summed up by Blackstone as follows (Lewis's Ed., p. 166):

> The only way by which courts of justice could anciently take cognizance of privilege of Parliament was by writ of privilege, in the nature of a supersedeas to deliver the party out of custody when arrested *in a civil suit*. For, when a letter was written by the speaker to the judges, to stay proceedings against a privileged person, they rejected it as contrary to their oath of office. But since the statute 12 W., III, c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it hath been held that such arrest is irregular *ab initio*, and that the party may be discharged upon motion. It is to be observed that there is no precedent of any such writ of privilege, *but only in civil suits;* and that the statute of 1 Jac., I, c. 13, and that of King William (which remedy some conveniences arising from privilege of Parliament) *speak only of civil actions*. And therefore the claim of privilege hath been usually guarded with an

> exception as to the case of indictable crimes; or, as it has been frequently expressed, of treason, felony, and breach (or surety) of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants, in any crime, whatsoever, for all crimes are treated by the law as being *contra pacem domini regis*. And instances have not been wanting wherein privileged persons have been convicted of misdemeanors, and committed or prosecuted to outlawry even in the middle of a session; which proceeding has afterwards received the sanction and approbation of Parliament. To which may be added, that a few years ago the case of writing and publishing seditious libels was resolved by both houses not to be entitled to privilege; and that the reasons upon which that case proceeded *extended equally to every indictable offense.*

In Bowyer's Com. on Const. Law of England (2d ed.), page 84, it is said that the members of Parliament are exempt from arrest in civil suits, and that the privilege does not extend to treason, felony, and breach of the peace, nor to contempts of court which are in the nature of criminal offenses.

In May's Law of Parliament, page 145, the author says that the privilege of freedom from arrest has always been limited to civil causes and has not been allowed to interfere with the administration of criminal justice. On the same page will be found the result of a conference by the Commons on August

17, 1641, the second and third conclusions of which are as follows:

> (2) That privilege can not be pleaded against an indictment for anything done out of Parliament, because all indictments are *contra pacem domini regis*.
>
> (3) The privilege of Parliament is granted in regard of the service of the commonwealth and is not to be used to the danger of the commonwealth.

The American authorities are to the same effect.

Judge Story, in his work on the Constitution, says (sec. 865):

> The exception to the privilege is that it shall not extend to "treason, felony, or breach of the peace." These words are the same as those in which the exception to the privilege of Parliament is usually expressed at the common law, and were doubtless borrowed from that source. Now, as all crimes are offenses against the peace, the phrase "breach of the peace" would seem to extend to all indictable offenses, as well those which are in fact attended with force and violence as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order. And so, in truth, it was decided in Parliament, in the case of a seditious libel published by a member (Mr. Wilkes) against the opinion of Lord Camden and the other judges of the court of common pleas, and, as it will probably now be thought, since the party spirit of those times has subsided, with entire good sense and in furtherance of public

> justice. It would be monstrous that any member should protect himself from arrest or punishment for a libel, often a crime of the deepest malignity and mischief, while he would be liable to arrest for the pettiest assault or the most insignificant breach of the peace. (See notes citing authorities.)

See, also, Paschal's Annotated Constitution, page 89.

At the time the Constitution was adopted imprisonment for debt obtained in all of the States, and this was no doubt one of the conditions which led the framers of the Constitution to borrow the phrase from the English law. (Review of the Constitution, by Bullitt, p. 128.)

Potter's Dwarris on Statutes and Constitutions (p. 644):

> But there is no such exemption in criminal cases and breaches of the peace. To proceedings on these, privilege of parliament is not considered applicable.

The same authority states that the privilege does not apply even in contempts of a criminal character. (See also Jefferson's Manual, par. 3.)

In *Geyer's Lessee* v. *Irwin* (4 Dall., 107), the Supreme Court of Pennsylvania said:

> A member of the General Assembly is, undoubtedly, privileged from arrest, summons, citation, or other *civil* process, during his attendance on the public business confided to him. And, we think, that upon principle, his suits can not be forced to a trial and decision while the session of the legislature continues.

Bouvier, volume 2, page 640, note, thus defines "peace:"

> The term peace in English and American law is used in a general way to express that condition which *is violated by the commission of crime.* In modern times it is expressed in England by the phrase *King's Peace* and in this country *Peace of the State or Commonwealth.*

In Words and Phrases Judicially Defined, volume 1, page 861, it is said that actual personal violence is not an essential element of the offense of breach of the peace and that any conduct destructive of peace and good morals is sufficient to establish the offense.

> *People* v. *Rounds*, 35 N. W., 77, 79, 67 Mich., 482.
>
> *Davis* v. *Burgess*, 20 N. W., 540, 542, 54 Mich., 514.

Bishop's Criminal Law (7th ed.), section 945:

> *In all cases of misdemeanor*, the court has, from the common law, authority to be exercised or not, as a sound discretion may dictate, to require, as part of a sentence, that the defendant give bonds to keep the peace and be of good behavior.

In *Dunn* v. *Regis* (12 Q. B., 1031, 1039, note), Dunn was convicted of perjury. It was contended in the exchequer that the chief justice had no authority in law to order Dunn to give security to keep the peace. Parke, B., referring to the case of *Hart* v. *Rex* (30 How. St. Tr., 1131, 1194, 1344) as his authority, declared that in all cases of misdemeanor the court might in addition to the sentence require the defend-

ant to give security to keep the peace. See also *O'Connell* v. *Regis*, 11 Clark & Finelly Rep., 155 (p. 251).

Story, section 865, *supra*, says:

> Now, as all crimes are offenses against the peace, the phrase "breach of the peace" would seem to extend to all indictable offenses as well as those which are in fact done with force and violence as those which are only constructive breaches of the peace of the government, inasmuch as they violate good order.

See also May's Law of Parliament, page 145, note, in which the Commons declared that all indictments are *contra pacem domini regis*. This explains the formal conclusion of all indictments, that the offense is against the peace of the sovereign.

The privilege not continuing even in civil cases.

The privilege, even in civil cases, is not continuing, but exists only during certain periods. Under the early English law it continued twenty days before and after a session of Parliament. (Hatsell, vol. 1, p. 40, note, above cited.) But later it was said to exist in the case of legislators, *eundo, manuendo, et redeundo*. (Bouvier, Rawles's Revision, vol. 2, p. 75.) And such is the language of the Constitution.

One in custody upon a writ of execution having had a writ of privilege and the sheriff setting him at liberty, it was resolved (Heath's Maxims, 279; Viner's Abridgement, 2d ed., vol. 11, p. 36):

> *First*, That the privilege was grantable, notwithstanding the execution, because the King

and the Realm have an interest in the body of every Burgess of Parliament, and the common weal shall be preferred before the interest of any private person. *Secondly*, That after the Parliament ended he might be taken in execution again; for that the plaintiff shall not be prejudiced in his execution by the act of the law which doth wrong to no man.

Stubb's Constitutional History of England, volume 3, page 533, *et seq.* (Oxford ed., 1880), cites a collection of civil cases where there was arrest and imprisonment during a recess and the defendants were liberated during the session, the rights of the plaintiffs being secured to them after the close of the session. (See case of William Lark, Rot. Parl. IV, 357, and 1st Hatsell, 17; Walter Clerke, burgess of Chypenham, Rot. Parl. V, 374, 1st Hatsell, 34.) Lark was the servant of Milrede, a member for London, and had been arrested at the suit of Margery Jannyns, committed to Fleet, and there detained for damages. The Commons petitioned that, in consideration of the privilege of members, Lark might be liberated during the session of Parliament. The King ordered the release of Lark, securing to the plaintiff her rights after the close of the session. Another case was that of John Atwyll, member for Exeter, against whom several writs of arrest had been obtained at the instance of a private litigant. The Commons petitioned that a writ of supersedeas should be issued, saving the rights of the suitor after the close of the session, which was done.

In *Coxe* v. *McClenachan* (3 Dall., 478) there was a civil judgment against the defendant, a Member of Congress, which was in session at the time, returned *non est*, and then a *sci. fa.* against special bail when the defendant was surrendered to the sheriff, and then a motion was made for leave to enter an *exoneretur*. The case was compromised by an agreement that the bail should remain responsible to surrender the defendant within four days after the end of the session.

In civil cases it might properly be held that the interest of the individual should yield to the necessities of the State. But in criminal cases it is the interest of the State that demands prosecution and punishment.

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ON THE MERITS.

Whether Conspiracy to Commit Subornation of Perjury is an Offense against the United States.

Counsel for plaintiff in error contend that a conspiracy to suborn perjury is an impossible thing, and therefore the indictment charges no offense. They say that "a charge that two or more persons conspired 'to suborn, instigate, and procure' other persons not parties to the conspiracy to commit perjury is equivalent to the charge that they conspired to solicit or to attempt to suborn those persons to commit perjury," and then ask, "Is it an offense against the United States to solicit or attempt to suborn another person to commit perjury?" (Brief, pp. 22–22.)

The fallacy of this argument is apparent. The mere attempt to do a thing denounced by statute as an offense against the United States may not be an offense against the United States; but a conspiracy, or a concerted attempt which amounts to a conspiracy, to do such unlawful thing is denounced by section 5440, Revised Statutes, as an offense against the United States.

It is no more impossible for two or more persons to conspire together to suborn other persons to commit perjury than it is for a single individual to attempt to suborn others to commit perjury. And the fact that the mere effort of the individual may not

be unlawful is no reason why the concerted attempt of several to do such prohibited thing may not be declared to be an offense against the United States. The extent of the authority of Congress in this respect was recognized in *Clune* v. *United States* (159 U. S., 595), where the court said:

> A conspiracy to commit an offense is denounced as itself a separate offense, and the punishment therefor fixed by the statute, and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. (*Callan* v. *Wilson*, 127 U. S., 540, 555.)

Alleged Technical Defects in the Indictment.

It is contended, in substance, that the indictment is insufficient because it does not state the object of the conspiracy with all the precision and detail as to time and place, identity of persons, guilty knowledge, etc., that are necessary in indictments for the commission of such offense.

But this objection, even if well founded, is met by the well-settled rule that in indictments for conspiracy to commit an offense against the United States it is not necessary to state the object of the conspiracy with the same strictness and certainty as is required in an indictment for the commission of the offense itself.

In *Ching* v. *United States* (118 Fed., 540), the Circuit Court of Appeals for the Fourth Circuit, per Judge Goff, said:

> *As to the sufficiency of the indictment, it must be first noted that the gist of the offense charged is that of conspiracy, which we think is properly pleaded. In such cases the offense which is intended to be committed as the result of the conspiracy need not be described as fully as would be required in an indictment in which such matter was charged as a substantive crime.* This indictment alleges that, prior to the commission of the crime charged, the defendant Guyther had been duly commissioned as an enumerator, and that he had regularly taken the oath of office. It also charges that the purpose of the conspiracy between the defendants was to have Guyther, as such enumerator, forward fictitious returns relating to the residents of his district to the Census Bureau. We think it clearly appears from the indictment itself that the defendants were fully advised of the nature of the offense charged, and of the means by which it was to be effected. Keeping in view the allegations that Guyther had been regularly appointed and qualified as an enumerator before the conspiracy was entered into, and that the purpose of such conspiracy was to have him, as such enumerator, make certain fictitious returns, which are fully set forth, we are of the opinion that all of the defendants were fully advised of the charge which they had to meet, and that it sufficiently appears that Guyther was an enumerator at the time the conspiracy is charged to have been entered into.

In *United States* v. *Stevens* (44 Fed., 141), District Court, D. Minnesota, Judge Nelson said:

> Again it is urged that the last count in the indictments is defective in not stating with sufficient certainty the offense which it is charged defendants conspired to commit. In other words, that the particular names which the enumerator falsely inserted should be specified, and unless that is done the act which it is alleged the defendants conspired to do, to wit, to put 300 false and fictitious names in the blanks, etc., is too general, and does not inform the defendants with sufficient certainty to make a defense; and, in case of conviction, they could not plead it in bar of another prosecution for the same offense. Several names are stated in this count of the indictment as fictitious, and charged to have been unlawfully and wrongfully inserted in the schedules by Strum. *This is sufficient; for, in stating the object of the conspiracy, the same certainty and strictness are not required as in the indictment for the offense conspired to be committed. Certainty to a common intent sufficient to identify the offense which the defendants conspired to commit is all that is required.* When the allegation in the indictment advises the defendants fairly what act is charged as the crime which was agreed to be committed, the chief purpose of pleading is attained. Enough is then set forth to apprise the defendants so that they may make a defense. The point urged seems more refined than sound.

In *United States* v. *Wilson* (60 Fed., 890), District Court, D. Oregon, the indictment charged the de-

fendants with conspiracy to commit the offense of aiding and abetting the landing of Chinese laborers not lawfully entitled to enter the United States, by furnishing them with false and fraudulent evidences of identification. It was contended that the indictment *described* but did not *charge* the offense. In overruling this objection, Judge Bellinger said (p. 894–895):

> The point relied upon is that the indictment states a conclusion as to the right of the Chinese persons, who were to be aided in landing by the conspiracy, to enter the United States; that it is not only necessary to set out all the facts constituting the crime which the conspiracy was formed to commit, but that each of such facts, as just stated, must be so pleaded as to preclude every possible inference favorable to the accused. This involves that highest degree of certainty which places the matter alleged beyond the most "subtle objection." No such certainty has ever been required in the statement of the object of a conspiracy. *In indictments for conspiracy the offense which the defendants are accused of having conspired to commit need not be set out with the same degree of strictness that is required where the indictment is for the commission of the offense itself. All the decisions upon this point are to the effect that certainty to a common intent is all that is necessary.* The allegation that the defendants conspired to aid and abet the landing in the United States, within this district, of Chinese laborers not lawfully entitled to enter the United States from the steam-

ships *Haytian Republic* and *Wilmington*, both plying between British Columbia and this port, states enough to clearly apprise the defendants of the identical crime with which they are charged.

* * * * *

The indictment alleges that the conspiracy was to aid and abet the landing in the United States and in the State of Oregon from the steamers Haytian Republic and Wilmington, plying between British Columbia and the port of Portland, Oreg., of Chinese laborers, not lawfully entitled to land in the United States. Leaving out of consideration the words "not lawfully entitled to enter the United States," the natural and obvious meaning of what is alleged is that the Chinese laborers referred to were laborers from British Columbia, seeking to land from the two steamers named, and it is by such meaning that the phrase "certain to a common intent" is defined. *This construction may be liable to technical objection, but the strictness that answers such objection is not, as has already been shown, required in the description of an offense where the indictment is for a conspiracy to commit such offense.*

It is equally well settled that when the object of the conspiracy is an act in itself unlawful, the means by which it was to be accomplished need not be set out in the indictment.

Thus in *Rex* v. *Eccles* (1 Leach's Crown Cases, 274), where an indictment charged that the defendants conspired together, by indirect means, to impoverish

one H. B. and to prevent him from exercising the trade of a tailor, and it was contended that it should have stated the fact on which the conspiracy was founded, the means used for the purpose, Lord Mansfield, C. J., said:

> The conspiracy and the object of it are both stated in the indictment. It is contended that the means by which the intended mischief was effected ought also to have been particularly set forth, but this is certainly not necessary, for the offense does not consist in doing the acts by which the mischief is effected, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means. The illegal conspiration is the gist of the offense.

So in indictments charging conspiracy to cheat and defraud, it is not necessary to state the means.

Thomas v. *People*, 113 Ill., 531.
People v. *Clark*, 10 Mich., 310.
People v. *Bird*, 126 Mich., 631.

In *People* v. *Arnold* (46 Mich., 268, 271), Judge Cooley said:

> To cheat and defraud by false pretenses a person named is an indictable offense by statute. In an information for this offense it would be necessary to specify the pretenses used; but in an information for conspiracy to cheat and defraud by false pretenses the like particularity is not essential. It is enough to allege in general terms the combination and agreement to commit the crime.

Chief Justice Fuller, delivering the opinion of the court in *Pettibone* v. *United States* (148 U. S., 197, 203), stated the rule as follows:

> A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means, and the rule is accepted, as laid down by Chief Justice Shaw in *Commonwealth* v. *Hunt* (4 Met., 111), that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful by criminal or unlawful means, the means must be set out.

The indictment in this case charges that the defendants, on June 30, 1902, at Prineville, in the District of Oregon, conspired to commit an offense against the United States, "that is to say, to unlawfully, willfully, and corruptly suborn, instigate, and procure a large number of persons—to wit, one hundred persons—to commit the offense of perjury in the said district, by taking their oaths there, respectively, before a competent officer and person in cases in which a law of the United States authorized an oath to be administered, that they would declare and depose truly that certain declarations and depositions by them to be subscribed were true, and being there-

upon contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be ture."

The indictment then proceeds to describe in detail the proposed subornation which was the object of the conspiracy, stating, in substance, that it was to suborn said persons to come before the defendant Biggs, a United States Commissioner for the District of Oregon, and swear that certain public lands of the United States in Crook County, Oregon, open to entry and purchase under the acts of Congress approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but in good faith to be appropriated to their own exclusive use, and that they had not directly or indirectly made any agreement or contract in any manner whatever by which the titles they might acquire from the United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when in truth and in fact, as each of said persons would then well know, and as they, the defendants, would then well know, such persons would be applying to purchase said lands on speculation and not in good faith to appropriate such lands to their own exclusive use and benefit, and would have made agreements and contracts with the defendants by which the titles they might acquire

would inure to the benefit of the defendants Williamson and Gesner as copartners in the firm of that name, then and before then engaged in the business of sheep raising in said county.

That this was sufficient to apprise the defendants of the nature of the charge against them, and amounts to "certainty to a common intent," can not be doubted.

That it was not necessary to state the time and place of the proposed subornation is clear. These, as well as the identity of the persons to be suborned, might not, at the time of the conspiracy, have been agreed upon; yet the conspiracy to commit such offense would have been complete.

In *United States* v. *Goldman* (3 Woods, 187; 25 Fed. Cas., 15,225), the indictment charged that defendants conspired to prevent, by force, intimidation, and threats, certain persons giving their support and advocacy toward the election of a lawfully qualified person as a Member of the Congress of the United States, in violation of sec. 5520, Revised Statutes, and alleged certain acts done in furtherance of the conspiracy. It was objected that the indictment was defective in not stating the time, place, and circumstances of the acts of advocacy and support; but the court said:

> The law makes such a conspiracy an offense. Now, as the support and advocacy which the alleged conspirators sought to prevent were, as stated in the first and second counts, to be given in the future, it is clearly not necessary to allege what shape that support and advocacy

were to take. The defendants could conspire to prevent the advocacy and support, in a lawful manner, by the voters, of the election to Congress of the person named, without knowing by what means that advocacy and support were to be carried on, and even before the means were agreed upon by the persons by whom the support and advocacy were to be given.

In *Dealy* v. *United States* (152 U. S., 539, 543) the court, by Mr. Justice Brewer, said:

> It is objected, in the first place, that there is no specification of the particular tract or tracts of which the defendants conspired to defraud the United States. There is nothing more definite than this, large tracts of land in the county of Rolette, State of North Dakota, such lands being public lands of the United States, open to entry under the homestead laws of the local land office of the United States at Devils Lake City, in said State. It is true no tract is named by number of section, township, and range, and the language is broad enough to include any or all the public lands of the United States situate within that county and subject to homestead entry at that land office. But manifestly the description in the indictment does not need to be any more definite and precise than the proof of the crime. *In other words, if certain facts make out the crime, it is sufficient to charge those facts, and it is obviously unnecessary to state that which is not essential.* Can it be doubted that if these defendants entered into a conspiracy to defraud the United States of public lands, subject to home-

> stead entry, at the given office in the named county, the crime of conspiracy was complete even if no particular tract or tracts were selected by the conspirators? It is enough that their purpose and their conspiracy had in view the acquiring of some of those lands, and it is not essential to the crime that in the minds of the conspirators the precise lands had already been identified.

It is contended that the indictment is insufficient because it fails to aver that the persons to be suborned were to make their false oaths willfully. In disposing of this objection and sustaining the indictment, the Circuit Court of Appeals for the Ninth Circuit said (*Van Gesner* v. *United States*, 153 Fed., 46, 53):

> The indictment, in effect, charged the defendants thereto with having conspired to falsely, willfully, and corruptly suborn, instigate, and procure certain named persons to commit the crime of perjury within the district of Oregon, by knowingly and intentionally swearing falsely to material matter required to be stated and shown both in the verified written statement or declaration, and in the proof by deposition. The whole scheme, as alleged, and proved to the satisfaction of the jury, shows beyond question that the false swearing contemplated by the conspiracy could not have been otherwise than willful on the part of the instigated persons. When the facts alleged necessarily import such willfulness, the failure to use the word itself is not fatal. Such failure, under such circumstances, would not be fatal even at common law. (C.

R. L., 309; Archbold's Cr. Pl., 429. See also *U. S.* v. *Howard* (D. C.), 132 Fed., 350, 351.)

It is not the name but the essence of the thing that should control the court in the administration of justice. As has already been said, the gist of the offense charged against the plaintiffs in error was the conspiracy, the object of which was the commission of the crime of perjury by numerous persons, in order that the conspirators might acquire the government title to the desired lands. "In stating the object of the conspiracy," said the court, in *United States* v. *Stevens* (D. C.), 44 Fed., 141, "the same certainty and strictness are not required as in the indictment for the offense conspired to be committed. Certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is required. When the allegation in the indictment advises the defendants fairly what act is charged as the crime which was agreed to be committed, the chief purpose of pleading is attained. Enough is then set forth to apprise the defendants so that they make a defense." (See also *Noah* v. *United States*, 128 Fed., 272, 62 C. C. A., 618; *United States* v. *Eddy* (C. C.), 134 Fed., 114; *U. S.* v. *Rhodes* (C. C.), 30 Fed., 431.)

We are of the opinion that the indictment is sufficient. * * *

In the case of *Dunbar* v. *United States* (156 U. S., 193) Justice Brewer, speaking for the court, said:

The language of the indictment quoted *excludes the idea of any unintentional and ignorant* bringing into the country of pre-

> pared opium upon which the duty had not been paid, and is satisfied only by proof that such bringing in was done intentionally, knowingly, and with intent to defraud the revenues of the United States.

In *Babcock* v. *United States* (34 Fed., 874, 876) Mr. Justice Brewer sustained an indictment for subornation of perjury from which the word "willfully" was omitted.

In *Connors* v. *United States* (158 U. S., 408) Mr. Justice Harlan, in answering the contention that the indictment was insufficient because it charged three distinct offenses in one count, said:

> Nor, if made by demurrer or by motion and overruled, would it avail on error unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the court to require a more restricted or specific statement of the particular mode in which the offence charged was committed. (Rev. Stat., sec. 1025.) There is no ground whatever to suppose that the accused was taken by surprise in the progress of the trial, or that he was in doubt as to what was the precise offence with which he was charged.

In the case of *Rosen* v. *United States* (161 U. S., 33, 34), Mr. Justice Harlan said:

> Of course he did not understand the Government as claiming that the mere depositing in the post-office of an obscene, lewd, and lascivious paper was an offense under the statute if the person so depositing it had neither knowledge nor notice at the time of its character or

> its contents. He must have understood from the words of the indictment that the Government *imputed* to him the knowledge or notice of the contents of the paper so deposited * * * The case is, therefore, not one of the total omission from the indictment of an essential averment, but, at most, one of the inaccurate and imperfect statement of a fact; and such statement, after verdict, may be taken in the broadest sense authorized by the words used, even if it be adverse to the accused.
>
> * * * * *
>
> A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar to any other further prosecution for the same crime.

The cases last cited were ones in which the indictments charged the commission of the offense itself, where more strictness is required than in indictments for conspiracy to commit such an offense.

The indictment in this case alleges the materiality of the matters so to be stated, subscribed, and sworn; that they were matters which said persons and the defendants would not believe to be true; that the defendant Biggs, when administering such oaths, would be an officer of the United States authorized by law to administer the same; and that the said oaths were to be administered in cases where a law of the United States would then authorize an oath to be administered.

In view of the authority cited as to the requisites of an indictment for conspiracy to commit an offense against the United States, further discussion of the technical objections made as to the sufficiency of the indictment in this case seems unnecessary.

The Final Proofs.

Error is predicated upon the admission in evidence of the final proofs, and testimony in regard thereto, upon the grounds (1) that the indictment charged conspiracy to suborn perjury only in the preliminary written statements; (2) that perjury could not be predicated upon the false statements pertinent to this case in the final proofs, because such statements were not expressly required by law to be made under oath.

It would seem unnecessary to discuss these propositions, because, assuming that the indictment could be held only to have charged conspiracy to suborn perjury in the preliminary written statement required by section 1 of the act, or that perjury could not be predicated upon the false statements made by the applicants in their final proofs, nevertheless the final proofs, and the question asked concerning them, were admissible because of their bearing upon the charge of conspiracy to suborn perjury in the preliminary written statements of the persons referred to by having them swear falsely as to the purposes for which they were applying for lands.

In determining whether the defendants were guilty of such offense, it was clearly proper for the jury to consider their motive. Their motive, as appears from the indictment itself, was to have the persons to be suborned transfer the lands to Williamson and Gesner after they had obtained the title thereto from the United States.

Assuming that the General Land Office had permitted the lands applied by the persons suborned in this case to be sold to them, and they had subsequently turned them over to Williamson and Gesner, there can be no question that such facts would have been admissible in evidence under the charge of conspiracy to suborn perjury in the preliminary statements of such entrymen. If the final step taken in pursuance of the alleged conspiracy would have been admissible, why not an intermediate one?

The intentions of such entrymen at the time of making their preliminary statements, after the conversations they had with Gesner, their intentions at the time of making final proof, and their action in turning over the lands to Williamson and Gesner after obtaining title, assuming the matter had gone that far, would each be links in a chain of circumstantial evidence tending to show an agreement to do that very thing, just as a contrary intention at the time of making final proof, or the failure to turn the lands over to the defendants after they had acquired title, would tend to discredit the idea of such an agreement.

At the trial of the case this occurred in connection with the admissibility of questions asked the witness Jones as to his intentions at the time of making final proof (Rec., 81–82):

> Q. Now, at the time you made this final proof, what was your intention as to what you would do with the land when you got title to it?
>
> (Same objection.)
>
> COURT. It goes in subject to the same objection. I understand the objection to apply to this question also.
>
> Mr. BENNETT. I think this is a little different from the other, your honor. It goes to the matter of what his intention was at the time of the making of final proof, and it may be that it depends upon that other question that has been holding back so that we would have some chance to present the authorities to your honor.
>
> COURT. Mr. Heney, do you contend that even if the construction must be put upon the indictment that the conspiracy charged was only on making that application to enter, that this would still be admissible testimony?
>
> Mr. HENEY. I believe that it would be, if your honor pleases, as tending to throw some light upon the question as to what the intent of the party was at the time the original entry was made; that it is a part of the *res gesta* of the transaction. If perjury was suborned for the original statement, the purpose of it was to secure title to the land for Gesner, and that anything done that could have been in contemplation of the parties at the time, is neces-

sary to be done in order to complete that purpose, would be a part of the transaction, which would be competent evidence to show the intent with which the other part was done.

COURT. I am inclined to think that that is the correct rule. On general principles I think that would be the correct view to take of it. Unless there is some rule that would be different, applicable to this particular charge, I should so hold.

The indictment was supported by proof that, prior to making any application whatever for lands under the timber and stone act, the persons whom the defendants were charged with conspiring to suborn had made contracts or agreements by which the titles they might acquire would inure to the benefit of Williamson and Gesner.

It was unnecessary to prove that they had, subsequent to the making of the preliminary written statements, made any such contracts or agreements, and no attempt was made to prove such a state of facts, the only contracts or agreements sought to be proved being those made prior to the making of the preliminary written statement.

That false swearing in the preliminary written statement as to the matters in question required by the act constituted perjury is not disputed. Hence the indictment charged a conspiracy to commit an offense against the United States, even though it did not cover the final proofs or false swearing upon the same subjects therein in the final proofs would not constitute perjury.

The Indictment is Broad enough to include the Final Proofs.

The indictment charges that the defendants conspired to suborn, instigate, and procure a large number of persons to commit the offense of perjury, by taking their oaths that they would declare and depose truly "that certain DECLARATIONS and DEPOSITIONS by them to be subscribed were true," and by thereupon, contrary to said oaths, stating and subscribing material matters contained in such DECLARATIONS and DEPOSITIONS which they should not believe to be true.

The indictment further charges that the defendants conspired to suborn, instigate, and procure a large number of persons "to state and subscribe under their oaths that certain public lands of the said United States lying in Crook County in said district of Oregon open to entry and purchase under the acts of Congress approved June 3, 1878, and August 4, 1902, and known as timber and stone lands, which those persons would then be APPLYING TO ENTER AND PURCHASE in the manner provided by law, were not being purchased by them on speculation," etc., "when in truth and in fact as each of the said persons would then well know," and as the defendants would then well know "such persons would be APPLYING TO PURCHASE such lands on speculation and not in good faith to appropriate such lands to their own exclusive use and benefit, respectively, and would have made agreements and contracts," etc.

Any person wishing to purchase land under the timber and stone act must file a paper, which is technically described in the provisions of the act as "a written statement in duplicate." This "written statement" is in the form of an affidavit, and is in substance and effect a "declaration" of intention to become a purchaser. The law provides that upon the filing of such "statement" notice shall be published for a period of sixty days, and that after the expiration of said sixty days "if no adverse claim shall have been filed the person DESIRING TO PURCHASE shall furnish to the Register of the Land Office satisfactory evidence," etc. Obviously at the end of the sixty-day period of publication "the person desiring to purchase" is still merely "applying to enter and purchase" the land in the manner provided by law.

The preliminary "written statement" which is required to be filed by any person desiring to avail himself of the provisions of the timber and stone act is designated and described by the General Land Office as a "sworn statement" in the blanks provided for the purpose of making such statement. (Rec., 74.)

The sworn statement is in the form of an affidavit, and not by way of question and answer like a deposition. It is described as an "affidavit" in the certificate of the officer who swears the applicant. (Rec. 75.)

This "sworn statement" is analogous to the preliminary "written statement" required by the preemption laws (see sec. 2264, Rev. Stat.), in which

the preemptor is required to describe the land settled upon by him and declare his intention to claim the same, and which has always been designated by the General Land Office as a "declaratory statement."

For this reason, and possibly also because the statute defining perjury (sec. 5392, Rev. Stat.) uses the words "any written testimony, *declaration*, deposition, or certificate," and not "affidavit or sworn statement," the pleader may be presumed to have referred to the sworn statement as a "declaration."

On the other hand, the final proof is in the form of a deposition and is described as a "deposition" in the note as to the effect of false swearing in making final proof, which appears upon the blanks furnished by the General Land Office for that purpose. (Rec., 132–134.)

As the ultimate object of the conspiracy was to secure title to the lands referred to, and as that could not be done without having the persons to be suborned swear falsely in both their "sworn statements" and final proof, it is but reasonable to suppose that by the expression "declarations and depositions" the pleader intended to cover both.

The fact that the "sworn statement" alone is mentioned in the overt acts set forth in the indictment is material. If, as is well settled, the overt acts can not be relied on for the purpose of strengthening the indictment, they can not be used for the purpose of weakening it.

The defendants were not taken by surprise by this construction of the indictment, although it is

true that Judge DeHaven, who presided at the first two trials of the case, restricted the evidence to proof of perjury in the preliminary "affidavit," or "sworn statement," of the applicant. The prosecution contended at each trial that it was entitled, under the indictment, to prove false swearing on the part of the applicants at the time of making the "final proof," as well as at the time of filing the preliminary "sworn statement," or declaration of intention to purchase. It will be observed that the prosecution put in evidence, without objection on the part of defendants, the "final proof" testimony of the applicant, B. F. Jones (Rec., 78).

Moreover, counsel for defendants also objected upon this third trial to the admission of any evidence tending to prove that the applicants swore falsely in the "sworn statement" (Rec., 103):

> And thereupon the defendants objected to each of said papers [the duplicate "sworn statements" or preliminary application papers of Green Beard] upon the ground that the indictment does not state any indictable offense, and upon the further ground that each of said papers varies from the indictment; that it is not any DEPOSITION or declaration such as is mentioned in the indictment; that it is not such a paper as can be made the basis of an indictment for perjury, and is variant from the indictment. Whereupon the objection was overruled by the court, and the defendants excepted to the ruling upon each paper, and their exceptions

> were allowed. And thereafter like applications of each and all of the other applicants hereinbefore designated, except the applicant Jones, was offered and received and put in evidence subject to the same objections and exceptions on behalf of the defendants, and it was stipulated and agreed that such objections should apply to each of these sworn statements.

See also Rec. 109 to same effect.

The introduction of the final proofs of Laura Biggs, Mrs. Williamson and several other persons was not objected to on the ground that no proper foundation had been laid, but was admitted in evidence "subject to the same objection and exception hereinbefore set forth, the court ruling that the indictment covered perjury in the matter of the final proofs and that testimony as to such final proofs was competent to sustain such indictment, to which ruling the defendants then and there excepted and their exception was allowed" (Rec., 394).

Proper foundation was laid for the introduction of these proofs in the examination of Government witnesses McAlpin, Edgar, Murray, and Mitchell (Rec., 297, 324, 346 and 354, et seq.) as to the character of the claims to which they referred. Moreover, the record does not appear to contain all the evidence.

It will be observed that Gesner specifically admitted that he told each of these persons, except Mrs. Williamson, which land to look at and then furnished the money to make final proof. (Rec., 429, et seq.) As

to Mrs. Williamson's final proof, see Rec., 451, 478, 501, 511, 514.

False Swearing in the Final Proofs Constituted Perjury.

While not provided by the express words of the statute, it is clear that the timber and stone act does, in purpose and intent, prohibit an applicant, at any time before the completion of his entry, from making any contract or agreement by which the title he may acquire shall inure to the benefit of any other person. Manifestly, if such a contract were permissible after the making of the preliminary "written statement," but before the completion of the entry by making final proof and paying the required fees, the expressed intention of the statute that the lands applied for should not inure to the benefit of any other person, and that it should not be sold in quantities exceeding 160 acres to any one person, would be defeated.

In *United States* v. *Budd* (144 U. S., 163) the court, speaking by Mr. Justice Brewer, in construing the timber and stone act, said:

> The act does not in any respect limit the dominion which the purchaser has over the land *after its purchase* from the Government or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another *in the purchase. If when the title passes from the Government* no one save the purchaser has any claim upon it, *or any contract or agreement for it*, the act is satisfied.

If it is the policy of the timber and stone act to withhold the power of alienation from the person desiring to purchase the land until he has completed his entry by making his final proof and paying the purchase price for the land, it necessarily follows that the Commissioner of the General Land Office not only possesses authority to make rules and regulations requiring the applicant to testify, at the time of making final proof, that he does not apply to purchase the land on speculation but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; but it is his unquestioned duty to make and enforce such rules and regulations for the protection of the Government.

Section 3 of the timber and stone act provides:

> Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

General authority to make such rules and regulations to give effect to the act also exists under sections 44, 453, and 2478, Revised Statutes. (*Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S., 309.)

The regulations of the Commissioner of the General Land Office for the enforcement of the timber and

stone act provide (see Circular from the General Land Office Showing the Manner of Proceeding to Obtain Title to Public Lands under the Homestead, Desert Land, and Other Laws, issued July 11, 1899, p. 46):

> 11. The evidence to be furnished to the satisfaction of the register and receiver at time of entry, as required by the third section of the act, must be taken before the register and receiver, and will consist of the testimony of claimant, corroborated by the testimony of two disinterested witnesses. The testimony will be reduced to writing by the register and receiver upon the blanks provided for the purpose, after verbally propounding the questions set forth in the printed forms. The accuracy of affiant's information and the bona fides of the entry must be tested by close and sufficient oral examination. *The register and receiver will especially direct such examination to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner wi h any person or persons whomsoever by which the title that may be acquired by the entry shall inure, in whole or in part, to the benefit of any person or persons except himself.* They will certify to the fact of such oral examination, its sufficiency, and his satisfaction therewith.

By the act of March 11, 1902, chapter 182 (32 Stat., 63), the affidavits and proofs required under this act were authorized to be taken before any United States commissioner, or commissioner of the court exercising Federal jurisdiction in the territory, or before the judge or clerk of any court of record in the land district in which the lands are situated.

The blanks provided by the Commissioner of the General Land Office for use in taking the final proof are similar to those set out in the record.

These regulations as to the making of final proof have been in force since July 16, 1887 (see instructions approved on that date by Secretary Lamar, 6 L. D., 114). It may well be held, therefore, that they have received the sanction of Congress by the act of March 11, 1902, authorizing such affidavits and proofs to be made before a United States commissioner as well as the officers theretofore authorized by law to take them.

It is settled that the courts of the United States will take judicial notice of the rules and regulations of the Land Department regarding the sale and exchange of the public lands.

Caha v. *United States*, 152 U. S., 221.
Cosmos Co. v. *Gray Eagle Co.*, 190 U. S., 309.

It appears that the trial court in this case recognized the force and effect of the regulations of the Commissioner of the General Land Office (Rec., 688).

But it is contended that, even admitting it to be as contrary to the purpose and intent of the timber and

stone act for an applicant thereunder, after making his "written statement," and before he makes final proof and completes entry, to contract or agree that the title acquired by him shall inure to the benefit of any other person, and that the Commissioner of the General Land Office is authorized to make rules and regulations to prevent such purpose and intent from being defeated, by requiring the applicant to testify, upon making final proof, as to whether he has made such a contract or agreement, still false swearing in that respect does not amount to perjury, because, while such rules and regulations may have the force of law, a violation thereof is not a criminal offense unless expressly so provided by statute. (*United States* v. *Eaton*, 144 U. S., 677.)

This is not, like *United States* v. *Eaton*, the case of the violation of a departmental regulation, but like *United States* v. *Bailey* (9 Pet., 238), and *Caha* v. *United States* (152 U. S., 211), a case, simply, where the departmental regulation afforded a place and opportunity for the commission of perjury.

In *United States* v. *Bailey, supra*, there was no statute of the United States expressly authorizing the taking of affidavits in the case of claims against the United States before a justice of the peace of a State, and the Secretary of the Treasury had no express authority to provide by regulation that affidavits so taken should be received in support of such claims. In *Caha* v. *United States, supra*, there was no statute expressly authorizing the Secretary of the

Interior to provide by regulation for the taking of oaths in contests before the local land officers in proceedings under the homestead laws, or even for any such contests at all. Yet in both those cases the authority of the Secretary to make the regulation was held to be implied, and it was also held that the false statements which were made in proceedings so authorized constituted perjury. In the *Caha case* the court said (152 U. S., 218–220):

> This is not a case in which the violation of a mere regulation of a department is adjudged a crime. *United States* v. *Bailey* (9 Pet., 238) is in point. * * * Nor is there anything in the case of *United States* v. *Eaton* (144 U. S., 677, 688) conflicting with the views herein expressed. In that case the wrong was in violation of a duty imposed only by a regulation of the Treasury Department. * * * This, it will be observed, is very different from the case at bar, where no violation is charged of any regulation made by the Department. All that can be said is that a place and an occasion and opportunity were provided by the regulations of the Department, at which the defendant committed the crime of perjury in violation of section 5392.

Nothing more can be said of this case. The regulations made by the Commissioner of the General Land Office for the purpose of carrying into effect the timber and stone act in its true intent and purpose merely provided "a place and an occasion and opportunity" where perjury might be committed.

In *Ralph* v. *United States* (9 Fed., 693) a regulation of the Treasury Department required that an affidavit of the surety upon a certain character of bond should be made before some officer qualified to administer an oath, signed by the surety, and setting forth his pecuniary responsibility. Such an affidavit was signed by the defendant before a proper officer, and he was indicted for perjury, on account of the false statements contained therein. On the trial of the case before the District Court, the affidavit was offered in evidence, and objection was made on the ground that it was not an instrument required by law to be sworn to, and therefore a false statement contained therein did not constitute perjury. Upon appeal, the court said (p. 695):

> * * * There can be no doubt it was competent for a regulation of the kind in controversy here to be made by the proper officer of the Treasury, namely, that before a bond should be accepted, which might authorize the delivery under the law then in force, of stamps on credit to a manufacturer of matches, an affidavit should be made showing the responsibility of the sureties, *and therefore this was an affidavit authorized by law;* and if the statements contained in it were false, and known to be so by the person making them, *then upon it perjury could be assigned.*

In *United States* v. *Hearing* (26 Fed., 744), which was an indictment for perjury in the preliminary affidavit required by the homestead laws, based upon false statements as to matters which were not ex-

pressly required by the statute to be sworn to in such affidavit, but only by departmental regulation, Judge Deady, after discussing the *Bailey case*, said:

> So here, the statute not having prescribed the mode of proving the excusatory or preliminary facts, a regulation of the Department might direct or permit that it be done by some such recognized mode of proceeding as the oath of the applicant, and thereupon such oath when taken is administered, in effect, under or in pursuance of a law of the United States, and therefore perjury may be assigned thereon. Whether such a regulation exists or not is a matter within the judicial knowledge of the court; that is, it is a matter about which the court may inform itself.

Adams v. *Church* (193 U. S., 510) is easily distinguishable from this case. That case involved the construction of the timber-culture act, which is materially different from the present statute. It was held that there was nothing in the language or spirit of that act to prevent an entryman, who had in good faith acquired a holding under the act, from alienating his interest prior to issuance of a final certificate or patent.

Upon filing his preliminary affidavit under the timber-culture act with the receiver and register, and on payment of $10, if the tract applied for is more than 80 acres, and $5 if it is 80 acres or less, the applicant is immediately permitted to "*enter*" the quantity of land specified. In other words, he then

immediately acquires a *vested* interest in the land of which he can not be arbitrarily deprived. Moreover, as soon as he has been permitted to "enter" the land he is required, if he has made an entry of a quarter section, "to break or plow five acres covered thereby the first year; five acres the second year, and to cultivate to crop, or otherwise, the five acres broken or plowed the first year; the third year he shall cultivate to crop, or otherwise, the five acres broken the second year, and to plant in timber, seeds, or cuttings, the five acres first broken or plowed, and to cultivate and put in crop, or otherwise, the remaining five acres; and the fourth year to plant in timber, seeds, or cuttings, the remaining five acres." It is also provided that "all entries of less quantity than one-quarter sections, shall be plowed, planted, cultivated to trees, tree seeds, or cuttings in the same manner and in the same proportion as hereinbefore provided for the quarter section," etc.

All the provisions of the timber-culture act are intended and calculated to benefit the Government and the public generally, as much as the applicant. He is required to expend his time and money in improving and cultivating the land, and he can not acquire title until the expiration of eight years from the date of his entry. And he must then prove "that not less than twenty-seven hundred trees were planted on each acre, and that at the time of making such proof there is still growing at least six hundred and seventy-five living and thrifty trees to each acre."

As stated, the applicant under the timber-culture act acquires a vested interest in the land the moment his application is accepted by the register and receiver of the land office. His entry having been allowed, and the proper land office fees having been paid, he becomes the equitable owner of the land, subject, of course, to the conditions precedent which are prescribed by the law. At the time he makes his entry he may be perfectly able, financially, to comply with the provisions of the law, but before the expiration of the long period of eight years he may have become financially embarrassed, or may have other reasons to desire to remove from the vicinity of the land, and it would be a great hardship and unconscionable condition if he were not permitted to sell his interest in the land to any other person who would be willing to accept and comply with the conditions prescribed by the law. It is not the policy of that law to prevent the original entryman from conveying his interest in the land before the issuance of patent, because it is to the advantage of the Government to have the provisions of the law complied with in respect to the planting of trees thereon by some person, and it is immaterial whether this planting is done by the original applicant or his assignee.

None of the reasons which apply to the timber-culture act have any bearing whatever upon the beneficent provisions of the timber and stone act. Under the latter law, the applicant is not required to do anything to improve the land or to benefit the applicant or general public, and he is permitted almost

immediately to acquire title to the land at a price which is far below the market value of the timber alone which is on the land, in the great majority of instances. But no right to the land applied for can be said to vest in him under this act until he has made final proof and paid the requisite fees.

In *Adams* v. *Church* the court distinguished the case of *Henderson* v. *Carkins* (135 U. S., 483), in these words (193 U. S., 515):

> In that case it was held that a court of equity would not grant a decree for specific performance of an agreement to sell the interest of the homesteader *made after settlement and before the oath is filed for final certificate.* But the homestead act specifically requires that the applicant shall make affidavit before entry is made that it is for the purpose of actual settlement, and not directly or indirectly for the use or benefit of any other person. (Rev. Stat., sec. 2290.) Further, the final proof requires affidavit by the applicant "that no part of such land has been alienated except as provided in section 2288" (Rev. Stat., sec. 2291), which statute permits the right of alienation to "church, cemetery, or school purposes, or for the right of way of railroads."

The court here recognizes that a contract by a homesteader to alienate his interest, made after filing his preliminary affidavit but prior to the issuance of a final certificate, is contrary to the purpose of the law that the land should not inure to the benefit of any other person.

The reasons for holding that an applicant under the timber and stone act can not lawfully contract to alienate his interest in the land prior to the completion of his entry are, as above indicated, very much stronger than in the case of land entered under the homestead laws, where, as in the case of lands entered under the timber culture act, the homesteader completes his entry and acquires a vested interest in the lands entered upon filing the preliminary affidavit and paying the required fees, and five years' residence upon such lands or the cultivation thereof is required before the final certificate and patent is issued.

As to the Admission of Testimony as to the Understanding of Applicants of their Arrangements with Gesner and their Purpose in Applying for the Lands.

The evidence shows that the defendant Biggs represented to the applicants that they had not made an agreement for the sale of the land they were applying to enter, such as was denounced by the timber and stone act, unless they had a written contract to that effect, and the applicants testified that such was their understanding and that they had made no contract with Biggs. Under such circumstances it was necessary and proper to cross-examine the applicants as to their understanding of the arrangements with Gesner and their intentions as to conveying the land to Williamson and Gesner at the time of filing thereon and of making final proof. Thus, Jeff Evans testified (Rec., 201):

> Q. What did you understand then by the word contract?

A. Well, I supposed by making a contract that I would have to go into writing, that I would turn this land over to him or he would pay me, as long as I did not sell it and take something on it, or sign a contract, that it was all right.

Q. Did Biggs say anything about that to you, as to his idea?

A. Yes, sir; he said that a man could prove up on a piece of land that way all right; it was all right as long as he hadn't made any agreement; and the way I understood it was that a man would have to go in writing.

Q. Did he say anything about writing, himself?

A. No—well, yes; he said that a man would have to go into writing or a contract.

Q. Did you say for, or did you say or contract?

A. For a contract.

Campbell Duncan, in testifying about his signing and swearing to his original application papers before the defendant, Biggs, as United States commissioner, after stating that Gesner had said "he would loan us, I think it was $450 or $475 when we proved up and gave him a mortgage on the land, for thirty or sixty or ninety days, something like that; when we were ready to turn it over, he would pay the balance; the remainder of the $500 for the deed," said (Rec. 545):

Q. Do you remember as to whether anything special was said about that, and as to your right to have any agreement or understand-

ing with Dr. Gesner or any one else as to what was to become of the land after you got title? Do you remember whether Mr. Biggs said anything about that at the time?

A. Who was to get the land?

Q. Yes; or what right you might have?

A. He said we could have an understanding. We could not make any contract.

Q. What did you understand by contract?

(Objected to as immaterial and incompetent. Objection overruled. Defendants except.)

A. I thought that it had to be drawed up in writing.

In *Olson* v. *United States* (133 Fed., 849), Circuit Court of Appeals, Eighth Circuit, an indictment for conspiracy to defraud the United States in respect to the entry of lands under the timber and stone act, where the entries referred to were procured in much the same manner as here, the court held that the intention and motive of the entrymen was a proper subject of inquiry. In discussing the meaning of the timber and stone act the court, after referring to *United States* v. *Budd*, 144 U. S. 154, and a prior decision of its own, *United States* v. *D. T. & L. Co.*, said (p. 853):

> This view of the meaning of the statute forbids sustaining the contention of counsel for plaintiff in error that there can be no violation of the act unless an enforceable agreement was made by the applicant before his application to enter the land whereby the title should

> inure to the benefit of another. To hold that the provisions of the statute that the applicant shall not have in any manner, directly or indirectly, made any agreement or contract whereby the title which he may acquire shall inure to the benefit of anyone except himself, contemplates an agreement or contract in writing good under the statute of frauds, would be to destroy the prohibitive conditions mentioned, and render ineffectual the object and purpose of the statute.

Upon the question of the motive and intention of the entrymen, the court said (p. 856):

> The indictment was based and the trial had upon the theory that these entries were not made in good faith by the several entrymen for their own use, but were made for the use and benefit of one or all of the defendants. A large amount of testimony was introduced for that purpose; in other words, it was sought to establish that the various entrymen, at the time they made their entries at the land office, did not intend the purchase to be for their own use and benefit, but as the agent or hireling of the defendants, for the use and benefit of the defendants, or some of them. We have before said that it was not necessary for the Government to establish an express agreement that the entry was made for some one other than the entryman, but that it was competent to show that the motive and intent of the party making the entry was that it was for the use and benefit of another; that the question for the jury to determine was, What was the purpose, intent, and motive of the parties when

they made the entry? That being so, it follows that the intent and motive of the party was the subject of inquiry, and the law, we think, to be that whenever the motive, belief, or intention of the person is a material fact to be proved under the issue it is competent to prove what such motive, belief, or intention was by the direct testimony of such person, whether he happens to be a party to the action or not. (*Berkey* v. *Judd*, 22 Minn., 287; *Garrett* v. *Manheimer*, 24 Minn., 193; *Gardom* v. *Woodward*, 44 Kans., 758; 25 Pac., 199; 21 Am. St. Rep., 310; *Frost* v. *Rosecrans*, 66 Iowa, 405; 23 N. W., 895; Bradner on Evidence, 390.) The testimony of such party as to his intent and motive is not conclusive, but is competent. We do not wish to be understood as saying that had the Government shown a specific, express agreement between the entryman and the defendants that in consideration of a given sum they would enter the land and then convey to the defendants such testimony would be admissible. It is unnecessary to now pass upon such a case. What we do decide is that where it is sought to show by a chain of circumstances that a party in doing an act was actuated by an illegal purpose and motive, it is competent for the party to testify directly that he had no such purpose or motive; and, also, where it is sought to show by a chain of connected acts and circumstances that an agreement existed, an agreement requiring the concurrence of minds, that it is competent for a party to such alleged agreement to testify directly that no such agreement existed.

The record also discloses that the applicants were reluctant and adverse witnesses, and unwilling to admit that they had committed perjury.

John F. Watkins testified, upon cross-examination by defendants' counsel (Rec., 145–146):

> Q. Didn't you testify at the first trial of this case, Mr. Watkins, in answer to the question, "As a matter of fact, you held the land at a whole lot more than you had any idea they would give you for it, didn't you? You held it at a $1,000, didn't you?" And did you answer, "Yes, I calculated to ask him $800 or a $1,000 for it when the time came to sell it to him."
>
> A. I think I did, but I done it to favor them men.
>
> Q. Done it to favor what men?
>
> A. These men indicated here. I didn't want to swear a straight lie, but I did all I could without it.

Henry Hudson testified (Rec., 228):

> Q. Did you receive a letter from Gesner?
>
> A. Yes; I did.
>
> Q. At the time Neuhausen was up there?
>
> A. No; It was before that.
>
> Q. How long before?
>
> A. Well, I think it was a week or a week or two, or such a matter.
>
> Q. What did you do with that letter?
>
> A. I burned it.
>
> Q. What was the substance of that letter?
>
> A. Well, he told me I had better relinquish; that he did not want us people in trouble up before the grand jury, and I think he said that Moody was on the back of it.

A similar letter was written to Christian Feuerhelm, as follows (Rec., 252):

> PRINEVILLE, ORE., *May 13, 1904.*
>
> Mr. FEUERHELM, *Prineville, Ore.*
>
> DEAR SIR: That timber claim of yours and all of the balance I have got to throw them up. I am sure we would get into trouble over them before we got through with them, and then be turned down on them. I know that Mr. Moody and The Dalles land office are laying for us. I do not want to get into any trouble over them, and do not want any of my friends to get into trouble. You go before Mr. Biggs and relinquish your claim.
>
> Yours, respt.,
>
> V. GESNER.

The trial court recognized the fact that the applicants were unwilling witnesses and accomplices of the defendants in a scheme to defraud the Government of its lands, and, besides giving the instruction in relation to the testimony of accomplices at the instance and request of counsel for defendants (Rec., 692), permitted the prosecution to lead these particular witnesses whenever it appeared necessary to do so, and likewise to cross-examine them.

The importance and necessity of permitting the cross-examination of such witnesses by the prosecution is recognized in *United States* v. *Budd* (144 U. S., 165), where the court said:

> With regard to the two defendants, they having once sworn that there was no agreement, there was nothing farther to disclose.

If the Government doubted their statements under oath, it could have called either one and cross-examined him to its satisfaction. It is familiar law that where a witness discloses in his testimony that he is adverse in interest and feeling to the party calling him, the latter may change the character of his examination from a direct to a cross-examination, and the opposing party is always adverse in interest. In *Clarke* v. *Saffery* (Ryan & Moody, 126), in which the plaintiff's counsel called the defendant as his own witness and sought to cross-examine him, Chief Justice Best said: "If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination; but if a witness called, stands in a situation which of necessity makes him adverse to the party calling him, as in the case here, the counsel may, as matter of right, cross-examine him." (See also *People* v. *Mather*, 4 Wend. 229; *Bank of Northern Liberties* v. *Davies*, 6 W. & S. 285; *Towns* v. *Alford*, 2 Alabama, 378.)

Testimony as to Character of Timber Lands applied for and as to School Lands.

Both classes of evidence were admissible because of their bearing upon the motive, intent, or design of the defendants in entering into the alleged conspiracy.

Williamson and Gesner were in the sheep business and had their summer range at a place known as "Horse Heaven," about 20 miles from Prineville. (Rec., 394–396.) All the odd-numbered sections of the township in which their summer range lay were

owned by a wagon-road company, of whom Williamson and Gesner leased several sections. (Rec., 398–399.) The firm appears to have owned the land upon which their shearing plant was located in "Horse Heaven," but no other land in that vicinity. They ran their sheep upon the leased land and the Government domain (Rec., 396), the latter being composed of even-numbered sections in said township. In May, 1902, when their own lease was about to expire, Williamson and Gesner appear to have learned that a rival sheep firm by the name of Morrow & Keenan had contracted to lease the odd-numbered sections they desired from the wagon-road company. It is to be observed that the testimony of C. E. S. Wood, which appears to have borne upon the matter of the leasing of these sections to Morrow & Keenan, is omitted from the bill of exceptions. It is referred to, however, in several places. (Rec., 423–424, 453, 483–484, 491.) The defendants at once, as the testimony overwhelmingly shows, entered upon a scheme to acquire all the even-numbered sections in said township by purchasing direct as much as they lawfully could themselves and inducing as many other persons as they could to make entries which would inure to their benefit, upon an understanding and agreement that they would furnish the money for proving up and would make the transaction net the entrymen $75 each when they had acquired title and conveyed the property to them, borrowing large sums of money for the purpose, and employing Biggs, a United States commis-

sioner and a practicing attorney, to aid them. In June and July, 1902, thirty or forty persons made such entries at the instigation of the defendants, Gesner admitting that he selected the claims for all of them (Rec., 429–431). Biggs, Gesner, Williamson, and Williamson's wife all filed upon land in the same locality at the same time (Rec., 428, 476). The evidence clearly shows that the lands selected by Gesner for the entrymen referred to were selected without any regard to the amount of timber on them. The testimony of the various applicants shows conclusively that not one of them filed upon the land selected for them by Gesner because it was chiefly valuable for timber, but simply because Gesner and Williamson (the latter also participating to some extent in the selection) picked it out for them.

The fact that the lands so selected were, as the testimony conclusively shows, far more valuable for grazing than for timber purposes, and in fact contained little or no marketable timber, clearly indicates the motive which actuated the defendants in entering into the alleged conspiracy.

Some of the testimony as to the character of the lands was introduced by the prosecution in its evidence in chief and the rest of it in rebuttal. Both Williamson and Gesner testified in their own behalf and endeavored to maintain that the claims referred to were good timber lands (Rec., 415–419, 476); that the quality of the timber determined them in locating the applicants (Rec., 418), although the explanation given for their loaning money to the applicants

upon such claims without charge was that they were to have the use of the land for grazing purposes. (Rec., 399–400.)

It was proper therefore in rebuttal to prove the falsity of their statements as to the character of the land.

So, too, as to the State school lands, the defenddants, Williamson and Gesner, in their testimony, admitted certain facts as to their loaning money on these lands, but denied any guilty intent. It was proper to disprove their statements as to their intentions by showing, in rebuttal, that they had committed similar contemporaneous acts with wrongful intent and as a part of the same general plan.

The attempt of Gesner to get Perry to file upon the school lands was made at the very time that the entries under the timber and stone act were being made at the solicitation of the defendants, and such school land was in the same locality as such timber claims, namely, in the "Horse Heaven" country (Rec., 627). So, also, the school land filed upon by Mrs. Swearinger at the request of Gesner, and for which he gave her $25, was applied for at the same time and was in the same locality (Rec., 628–633).

In *Wolfson* v. *United States* (101 Fed., 434) the Circuit Court of Appeals, Fifth Circuit, said:

> When a defendant is on trial for one offense, irrelevant testimony of the commission of another offense should not be received. If, however, the evidence is relevant, if it tends to prove the commission of the offense for which

the defendant is on trial, or, in cases where the intent is material, if it tends to show the intent with which the act charged was committed, the fact that the evidence shows the commission of another offense does not serve to exclude it. In *Wood* v. *U. S.*, 16 Pet., 342, 360, the Supreme Court, Mr. Justice Story speaking for the court, said:

"Where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment."

In the case of *Moore* v. *U. S.* (150 U. S., 57), the defendant was indicted for the murder of Charles Palmer. The Government relied mainly on circumstantial evidence. Some of this evidence tended to show that the defendant was also guilty of the murder of a man named Camp. Objection was interposed to that part of the evidence. Mr. Justice Brown, speaking for the court in that case, said (at p. 61, 150 U. S.):

"The fact that the testimony also had a tendency to show that defendant had been guilty of Camp's murder would not be sufficient to exclude it if it were otherwise competent."

The trial judge carefully limited the application of Moxey's evidence. The jury was instructed as to its purpose and was informed that it was not offered, and could not be used, for the purpose of convicting the defendants

> of offenses for which they were not on trial. The fact that this evidence tended to prove another crime does not, as we have seen, exclude it. * * *

In the case at bar the trial court carefully limited the application of all such evidence by the following instructions (Rec., 693):

> As I had occasion to admonish you during the course of the trial, however culpable you may believe the defendants, or any of them, may have been with reference to any offense testified to but not included in this indictment, or however well established you may deem the criminality of any of them in connection with any offense other than the one charged, you can not find the defendants or any of them guilty unless you find, beyond a reasonable doubt, that they have committed the crime of conspiracy to suborn perjury as defined in these instructions and as charged in the indictment. The examination into such collateral facts was allowed as tending to establish guilty intent, purpose, design, or knowledge and should be so considered in such relation to the charge under which they are tried.

The trial court further instructed the jury (R., 694):

> There has also been some evidence introduced before you tending to show the acquisition of certain lands in an unlawful manner by defendant Van Gesner, which lands belong to the State of Oregon, situate near to the public lands described in the indictment in this case. This evidence is admitted as tending to show a preexisting design, plan, or scheme on the

part of the defendants Van Gesner and Williamson, as bearing upon the question of motive in the doing of the particular acts charged in the indictment; and it is limited in its relavancy to the charges against Williamson and Gesner. It has no relation to the defendant Biggs, and you can not consider it as bearing upon the question of Biggs's guilt or innocence.

There is, too, some evidence before you in relation to the character of the land applied for by some of the applicants; that is, whether it was heavily timbered or stony, or the like. The question of whether or not the lands applied for by the several entrymen and entrywomen were lawfully of a character subject to entry under the timber and stone law, is not directly involved in this charge of a conspiracy to suborn. The relevancy of such evidence is the relationship it may have to the motive or intent or design of the defendants in the doing of the acts charged against them in the indictment under which they are tried.

In *United States* v. *Budd* (144 U. S., 163), the court said:

> Nor is this a case in which one particular tract was the special object of desire, and in which, therefore, it might be presumed that many things would be risked in order to obtain it; for it is clear from the testimony that not the land but the timber was Montgomery's object, and any tract bearing the quality and quantity of timber (and there were many such tracts in that vicinity) satisfied his purpose.

In this case the evidence clearly shows that Williamson and Gesner were not desirous of purchasing timber lands in a particular vicinity for the purpose of securing the timber, but that what they wished was to secure the land itself for grazing purposes. The evidence shows that there was strong rivalry between the sheep men and the cattle men for possession of that particular range, as well as between the defendants Williamson and Gesner and the firm of Morrow & Keenan. Under these circumstances "it might be presumed that many things would be risked in order to obtain it." It is apparent that "one particular tract was the special object of desire" on the part of Williamson and Gesner.

In *Moore* v. *United States* (150 U. S., p. 60), the court said:

> We think it was within the discretion of the court to admit the testimony in dispute of Kitty Young. As intimated in the case of *Alexander* v. *United States* (138 U. S., 353), where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors. There are many circumstances connected with a trial, the pertinency of which a judge who has listened to the tes-

> timony and observed the conduct of the parties and witnesses is better able to estimate the value of than an appellate court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter. It was said by Mr. Justice Clifford, in delivering the opinion of this court in *Castle* v. *Bullard* (23 How., 172, 187), that "whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other." And in *Hendrickson* v. *People* (10 N. Y., 13, 31) it is said that "considerable latitude is allowed on the question of motive."

In *Olson* v. *United States*, *supra*, commenting upon the admission of evidence of similar offenses committed at or about the same time for the purpose of showing the intent of the parties in the case on trial, the Circuit Court of Appeals for the Eighth Circuit said (133 Fed., 854):

> We see no objections to the validity of the indictments which were dismissed; but, even though they were invalid, no prejudice resulted, as all the evidence received was admissible under the indictment upon which the conviction was had. The charge was conspiracy to defraud the United States out

of a large tract of land. A portion of the lands were embraced in each indictment, and in the trial of either case evidence which tended to establish other related acts of the same character, done at or about the same time, were admissible as tending to establish the motive and intent of the defendants. In *Wood* v. *United States* (16 Pet., 342–360), it was said:

"Fraud, being essentially a matter of motive and intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive, but all combined together may become almost irresistible as to the true nature and character of the transaction in controversy. The case of *Irving* v. *Motley* (7 Bing., 513), turned upon this very point. There the action was trover to recover back goods which had been purchased by an agent for his principal by means of a fraud. In order to establish the plaintiff's case it became necessary to show that other purchases had been made by the same agent for the same principal, under circumstances strongly presumptive of a like character. No doubt was entertained by the court of the admissibility of the evidence."

In *Holmes* v. *Goldsmith* (147 U. S., 164), the court said:

As has been frequently said great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can

see of the surrounding facts and circumstances the more correct their judgment is likely to be. The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.

The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.

In *People* v. *Bentley* (75 Cal., 409), the court said:

> A conspiracy, like most other facts, may be proved by circumstantial evidence. Indeed, it is not often that the direct facts of a common design, which is the essence of a conspiracy, can be proven otherwise than by the establishment of independent facts, bearing more or less remotely upon the main central object, and tending to convince the mind reasonably and logically of the existence of the conspiracy.
>
> In the language of Greenleaf: "If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another

> part of the same so as to complete it, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object." (3 Greenl. Ev., sec. 93; *United States* v. *Doyle,* 6 Saw., 612.)

In 8 Cyclopaedia of Law and Procedure, 685, it is said:

> The evidence in a conspiracy is wider than perhaps in any other case. Taken by themselves, the acts of a conspiracy are rarely of an unequivocally guilty character, and they can only be properly estimated when connected with all the surrounding circumstances. (Citing Roscoe Crim. Evidence 88, approved in *People* v. *Saunders,* 25 Mich., 119.)

Charge of the Court.

Considerable stress is laid in the brief for plaintiff in error upon the alleged failure of the court to submit to the jury the question of the defendants' good faith and their belief in the lawfulness of their conduct. (Brief, 121–131.)

In view of the full and complete instructions on these matters given by the court (Rec., 690–691), the contentions of counsel in this regard are clearly unwarranted.

The charge of the court was eminently fair and just and fully covered all material phases of the case.

Branton was a stranger and only temporarily in Prineville. He met Campbell Duncan and a man named Adams the night before Gesner and Williamson met several of the entrymen up in the timber, and they talked over the timber proposition, and Duncan told him that Gesner was going to be at the shearing plant, some 20 miles west of there, the next day to locate people on land and wanted more people to locate, and he got the notion of going with him (Rec., 530). Duncan also told him that Doctor Gesner was rustling for 100 men and that he might make $75 or more out of it (Rec., 530).

On direct examination Branton gave a different version of what Gesner said at the timber as to making a contract to buy the claims from that given by the applicants themselves. (Rec., 522.)

On cross-examination to test his credibility Branton was asked (Rec., 529–530):

> Q. How did you happen to be up in that country at the time these timber claims were being taken up? Where were you going then?
>
> A. I was going to eastern Oregon, from Lane County. I had been in the lumber business on the Siuslaw and got washed out and pretty badly used up; lost something like $4,000 worth of logs in the flood and was feeling rather on the blue order, and didn't feel like logging at the present time, and I went out there with the idea of taking up a homestead and possibly locating in the country.
>
> Q. I thought you were on your way to Idaho; wasn't you?

A. When I met Campbell Duncan?
Q. Yes.
A. No, sir; I was not.
Q. Did you say you were?
A. I did not.
Q. You didn't tell him that?
A. I did not.
Q. Didn't tell anybody that?
A. I did not.

In rebuttal the Government recalled Campbell Duncan (Rec., 585) and called William Adams (Rec., 592). These two witnesses testified that Branton had told them on this occasion that he was going to Idaho. (Rec., 586, 593.) To this question the defendants objected, the grounds of their objection being indicated by the following from the testimony of the witness Adams (Rec., 593):

Q. Did he say anything to you about where he was going at that time?

Mr. BENNETT. That is objected to as incompetent and not a proper impeaching question, and no proper foundation laid for it.

Q. Well, did he state to you that he was going to Idaho at that time?

A. Yes, sir.

Mr. BENNETT. We make the same objection to that question, and move to strike out the answer, as we did not have time to object before the witness answered the question, on the ground that it was not called to the attention of the witness, and no foundation laid for it.

COURT. Was it called to the attention Branton?

Mr. HENEY. Yes. Here is the way the question was asked on cross-examination:

"I think you were on your way to Idaho, weren't you?—A. When I met Campbell Duncan?

"Q. Yes.—A. No, sir; I was not.

"Q. Do you say you were?—A. I did not.

"Q. You didn't tell him that?—A. I did not.

"Q. Didn't tell anybody that?—A. I did not."

The COURT. Let him answer.

Mr. BENNETT. We object to the question and the answer as not being proper rebuttal, and as being an impeachment question without any foundation having been laid, or the time and place or persons present being called to the attention of the witness.

Q. At the time of the conversation I refer, was this man camping there at your place?

A. Yes, sir.

Q. How long was he there?

A. Three nights and days.

Q. I am talking about the time he was camped there. Did he then state to you that he was going to Idaho?

Mr. BENNETT. We renew the objection heretofore made.

Objection overruled; defendants except.

A. Yes, sir.

Q. Was Duncan present when he said this? Was Cam Duncan present when Branton said it to you?

A. Yes.

It will be observed that Campbell Duncan had already testified on cross-examination by defendants' counsel when the prosecution was presenting its main case, that Branton had said, on the occasion referred to, that he was on his way to Idaho. (Rec., 556.)

On cross-examination Branton was also asked (Rec., 533–534):

> Q. About one year after you had been up to the timber and in Prineville didn't you have a conversation with Frank Ray, and didn't you tell him that the reason you did not take a timber claim of that kind was because there wasn't enough in it?
>
> A. I don't remember having any conversation with Frank Ray at all regarding timber.
>
> Q. Will you swear you did not say that to him?
>
> A. I am positive I have never met Frank Ray to my knowledge except once, from the time we were up there in the timber until since I came here to Portland at the trial.
>
> Q. When was that once?
>
> A. I met him on the road east and north of Prineville. I don't remember the name of the stream he was on, but I was going up to look after some horses I had, and I met Frank Ray, if I remember right, and I might possibly be mistaken in meeting him there; it might have been some one else.
>
> Q. When was that?
>
> A. That would have been in May or June, 1903.

Q. Did you tell him on that occasion at that place that the reason you did not take a timber claim, referring to the time you went up there when Dr. Gesner was there, was because there wasn't enough in it for you?

A. No, sir; I did not.

Q. Or that in substance.

A. No, sir.

Q. Did you have a talk with Campbell Duncan in Prineville in 1903, about a year after you had been up there, in which you told him the reason you did not take a claim there was because there wasn't enough in it.

A. I have met Campbell Duncan a number of times, but whether I met him at Prineville I would not be positive since the time in 1902 that we were up above.

Q. Did you tell him that on any of those occasions?

A. I don't remember having told him that in substance.

In rebuttal Duncan was asked (Rec., 587):

Q. Did you have a talk with Branton in Prineville in the year 1903, about a year after you had been up to the timber?

A. Yes, sir.

Q. And in that talk did Branton tell you that the reason he did not take up a claim was because there wasn't enough in it?

A. Yes, sir.

Mr. BENNETT. We object to that—no sufficient foundation laid for impeaching; time, place, and person present were not called to the attention of the witness.

The witness answered the question before I had time to get in the objection, and I desire to move to strike out the answer.

Mr. HENEY. This question was asked of the witness, Branton, and there was no objection made on the ground that the question was not particular enough.

Mr. BENNETT. That is not a proper time to make an objection of that kind. What I want to call Your Honor's attention to is that there is nothing in the question in regard to persons present. One of the important things in an impeaching question is to call the attention of the witness sought to be impeached to the time, place, and persons present for the purpose of identifying the occasion to the witness. It was not for us to object at that time. We did not know whether they were going to call anybody to impeach him.

Objection overruled. Defendants except.

Frank Ray's testimony in rebuttal (Rec., 615):

Q. And on that occasion did he say to you that the reason he did not take a timber claim at that time that he was up there at the shearing plant was because there wasn't enough in it, or words to that effect?

Mr. BENNETT. We object to that question upon the ground that there is no proper foundation for impeachment laid, and that the circumstances of time, place, and persons present were not called to the attention of the witness, Branton, while he was on the stand.

> Mr. HENEY. The witness, Branton, testified that he met Frank Ray at this particular place at that time. (Mr. Heney here read the evidence given by Branton on this point.)
>
> Objection overruled. Defendants except.

It is submitted that the court exercised a proper discretion, under the circumstances, in admitting this impeaching testimony. The circumstances as to Branton's testifying were not above suspicion and indicate that he may have been suborned. He did not testify at the other two trials (Rec., 534), and came to this trial without subpœna upon private communication from Gesner and was paid by Gesner for coming. (Rec., 528.)

Sufficiency of the Evidence.

Counsel for plaintiff in error contend that they are not concluded by the statement at the beginning of his bill of exceptions that "the plaintiff offered evidence during said trial sufficient to go to the jury tending to prove each and every material allegation of the indictment" (Rec., 71).

Reliance is had upon *Wiborg* v. *United States* (163 U. S., 632, 658), and *Clayatt* v. *United States* (197 U. S., 207). But in those cases the court merely held that they would notice a plain error, although not properly raised.

Here, there was not only no motion to direct a verdict of acquittal, and the sufficiency of the Government's proof to warrant a conviction was not

raised at the conclusion of the case, but there is a solemn averment in defendant's bill of exceptions that "the plaintiff offered evidence during said trial sufficient to go to the jury tending to prove each and every material allegation of the indictment." Under these circumstances, can he be permitted to make an issue of those facts in this court?

If not estopped from so doing, it would seem that his contentions in this regard are discredited.

Besides, it appears that the record does not contain all the evidence. For one thing, the testimony of C. E. S. Wood, which is several times referred to (Rec., 423–424, 453, 483–484, 491), is not in the bill of exceptions.

The matters upon which it is claimed that the evidence was insufficient to go to the jury will now be adverted to.

Proof of Overt Acts.

Counsel for plaintiff in error say (Brief, p. 186) that there is no evidence that the defendant Biggs prepared any of the sworn statements referred to in the indictment; that "for aught that appears in the testimony the statements completely prepared and ready for execution may have dropped from the skies, or, what is more probable, have been filled in and made out by the applicants themselves before going before the officer to take the oath."

In answer to this contention, reference need only be made to the testimony of Christian Feuerhelm,

one of the entrymen referred to in the indictment (Rec., 246):

Q. When you got into Biggs's office?

A. Yes; I told Mr. Biggs that Mr. Gesner had sent me.

Q. Did Biggs then produce the numbers himself?

A. Yes, sir.

Q. And he fixed up your papers for you?

A. Yes, sir.

As to whether the Evidence Tended to Prove that Unlawful Contracts or Agreements had been Entered Into by the Entrymen.

The testimony of the various entrymen in this case shows that they had a clear understanding and agreement with Gesner (though not in writing) that he would not only advance them the money upon proving up their claims, but that they were to convey the same to Williamson and Gesner after they had obtained the title thereto from the Government, and make $75 by the transaction. The following are samples of the testimony on this point:

Testimony of B. F. Jones (Rec., 72, 75, 76):

Q. State to the jury how you came to make the filing; who, if anybody, spoke to you about it, provided it was one of these defendants, and what you did.

A. Dr. Gesner spoke to me about it in Prineville.

Q. State what he said.

A. Well, he said if I and my wife would go up there——

Mr. BENNETT. Said what?

A. If I and my wife would take a claim, that he would give us $75 apiece when we proved up.

Q. Did he tell you where he wanted them taken?

A. Why, he said up there near the clipping corrals on the Wickiup.

Q. Is that what is called the Horse Heaven country?

A. Well, it is near there.

Q. Is it in township 15?

A. Well, I couldn't tell you the number of the township.

Q. Is that the section of the country where you did consequently file?

A. Why, I think so. It was in section 6.

Q. Well, I say is that part of the country that you are describing the part where you did consequently file?

A. Yes, sir.

Q. When you had this talk with Dr. Gesner, what did you say in reply to his proposition?

A. I told him that I would. Well, I don't know that I told him that I would that day, but the next time. I told him I would see my wife, I think. I don't remember just exactly the words I did tell him just then.

* * * * * * *

Q. What was your belief at the time you signed and swore to this, as to whether or not this statement in the paper was true: "I do not apply to purchase the land above de-

scribed on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure, in whole or in part, to the benefit of any person except myself?"

A. Well, if I had got the $75 it would have been for my benefit, wouldn't it?

Q. The $75 would have been; yes.

A. Yes.

Q. But what was your belief as to whether the purpose with which you were taking the land was to have the land for your own special use and benefit?

A. Well, I had agreed to have taken that from Gesner, of course; I admit that—that I did agree to take it from him.

Testimony of Campbell Duncan (Rec., 541–543):

Q. Did you file on a timber claim in 1902?

A. Yes, sir.

Q. Who, if anybody, first spoke to you about making a filing?

A. M. R. Biggs.

Q. I wish you would go on and tell the whole story; what was done about it; what was said—all about it. Tell it to the jury.

A. Why, we met in Prineville—in a conversation after we had met on the streets—I don't know how the talk came up, who mentioned first about the timber. There was quite an excitement in that country about

timber up the Des Chutes River, and I don't remember whether it was himself or myself that first spoke about it, but he asked me if I had used my right; said that if I would locate up near the shearing plant that Dr. Gesner would loan me the money to prove up on the claim.

Q. Go on; tell the whole story.

A. Well, I said something to him about selling it, and he said when I acquired the title that Gesner would buy it and pay me $500. He said he could make no contract, but *he* could understand one another in regard to the price to pay for it.

Q. Anything said about how much that would leave you?

A. He said about $75.

* * * * * * *

Q. What did Gesner say?

A. Why, he said that he would loan us, I think it was $450 or $475, when we proved up and gave him a mortgage on the land, for thirty or sixty or ninety days, something like that. When we were ready to turn it over he would pay the balance—the remainder of the $500 for the deed.

Such evidence, to say the least, certainly "tended" to prove that unlawful agreements had been entered into by the entrymen.

Williamson's Connection with the Conspiracy.

It is admitted that Williamson knew that Gesner was using the firm's money for the purpose of getting persons to enter the lands they desired for grazing

purposes in the Horse Heaven country, although a legitimate construction is sought to be placed upon such fact (Rec., 403, 405).

Gesner tried to maintain that he never told Williamson about making the loans upon timber lands until the middle of July, 1902 (Rec., 426). Later on in his cross-examination this occurred (Rec., 428–429):

> Q. How do you suppose Williamson came to select this and have his wife file on it on July 1, and that you at the same time selected and had Campbell Duncan and his wife file on these two on June 30, the day before, if you didn't have any talk with Williamson before he started back to The Dalles on June 25?
>
> (Objected to as calling for the supposition of the witness as to what somebody else ——)
>
> COURT. He may answer as to his knowledge.
>
> Q. What is your explanation of that, if you have any to offer?
>
> A. As I said, we might have talked about it—talked about taking up claims ourselves, and his wife taking one. His wife had been along that road a great many times and knew that claim, and she could file on it without coming out there and looking at it.

On redirect examination by his counsel, Gesner said that Williamson was at Prineville in June and that the probability was that they talked the business of loaning money on timber claims over some (Rec., 458).

Williamson admitted on his first trial that if he was at Prineville in June, 1902, about which there can

be no doubt (Rec., 472), he must have canvassed the matter of making loans on timber lands some with Gesner (Rec., 474).

Williamson was within a table's length distance when Gesner called Hudson across the street and said he would give him $500 for a deed to his claim if he would take one up; that there was $75 in it for him (Rec., 221).

Frank Ray testified (Rec., 595) that Green Beard first spoke to him about filing; that "he come along there from town, stopped at my house and told me that Williamson and Gesner was having some timber claims taken and they wanted me—I and my wife—to take one. He was going to take one. They had spoke to him and his wife."

Williamson endeavored at the first and second trials to maintain that he was not at Prineville at the time of the alleged conspiracy, in June, 1902, but the evidence adduced forced him to abandon this "theory of defence" (Rec., 472, 504). On this trial Williamson said that he was up in the timber in "July," 1902; that it was the same trip Watkins and Gaylord were there, and that he went up there with Gesner for the purpose of surveying some road land they had leased, their timber claims, and the claims Gesner was going to loan money on (Rec., 480, 481, 482).

Watkins and his wife, Crain, and Gaylord all testified positively as to Williamson's being up in the timber at Prineville at the time they located their claims,

and each testify to the fact that Williamson wrote the numbers of their respective claims down in Watkins's book (Rec., 137, 182, 262, 649). Watkins introduced Gaylord to Williamson, telling him that Gaylord wanted a claim, and that he would be all right for one (Rec., 137). In reply to the questions, "What, if anything, was said about the pieces? Did anybody take you to the land and show you which pieces?" Gaylord testified (Rec., 649):

> A. Well, when we found Mr. Williamson, he was on the section that Mr. Watkins and his wife and Mr. Crane and his wife were supposed to take; and then he told us where we would find the piece I was to take, described it by a certain corner that was set beside the road, that we would see as we went back.
>
> Q. Did you see it as you went back?
>
> A. Yes.
>
> Q. Found it from his description?
>
> A. Yes, sir.

Watkins testified (Rec., 136):

> Mr. Biggs told me that Williamson and Gesner wanted people around there to file on timber claims in a body of timber about 25 miles east of Prineville; they would furnish the money to pay the expenses and when they got their patent they would give them $500 for it.

Crain testified that Watkins told him "they" did not want him or his wife to prove up; that he thereupon went before Biggs and relinquished, and that Biggs told him that Gesner would pay his money back

for the filing fees; and that he and Gaylord, who relinquished at the same time (December 8, 1902), then went to Gesner's office. The record then shows (Rec., 185–186):

Q. Now, who was in Gesner's office when you got there?

A. Mr. Williamson and Dr. Gesner.

Q. What, if anything, was said while you were there? State all that was said that you can remember.

A. I don't remember much about what was said. Gesner wrote me out a check for the money what I was out for the fees for me and my wife.

Q. Did you say anything to him about it before he wrote it?

A. I don't remember now whether I did or not.

Q. I believe it was $19.50?

— ———.

Q. Do you remember how it was signed?

A. No, sir; I do not.

Q. What did you do with it after you got it?

A. Put it in my pocket.

Q. Well, what did you do with it after that?

A. Why, I cashed it. I don't know when it was, whether it was the same day or not.

Q. You went to the bank yourself, did you?

A. Yes, sir.

Q. On the Prineville bank?

A. I think I did.

Q. Did you see Gaylord get one?

A. Yes, sir.

Q. At the same time?

A. Yes.

Q. Was Williamson present when you received it?

A. Yes, sir.

—. ———.

Q. Well, Mr. Williamson said that he didn't think it would be hardly safe to go ahead and try to make final proof on the claims now; that there was—I believe he said Hitchcock was making a little kick about timber frauds or something in regard to that. He went ahead and read a little sketch in the paper to us, in the Oregonian I believe it was, in regard to that. I don't remember just how it read now.

Q. Anything said about taking up a claim later?

A. Yes. He said he thought later on we could go ahead and file again and go ahead and prove up on the claims.

Gaylord's testimony as to the same incident was as follows (Rec., 651):

Q. You say you went to see Gesner. Where did you find Gesner?

A. I found him in his office.

Q. Was there anybody else there?

A. Wilford Crane and Mr. Williamson.

Q. Was Wilford Crane with you when you were in Bigg's office?

A. Yes, sir.

Q. Now, in Gesner's office; who else was there besides Crane and Gesner?

A. Mr. Williamson.

Q. What talk took place there?

A. Well, we talked with Mr. Gesner about proving up on the land, and he said he was sorry that we couldn't go ahead; but he thought that after this scare was over we would be able to go ahead and prove up on the land. And Mr. Williamson was reading the Oregonian, and he read a little sketch out of it where Mr. Hitchcock was raising kind of an excitement over this land business.

Q. Can you remember the substance of any that he read?

A. No; I don't.

Q. Do you remember anything else that was said there?

A. No; I don't recall anything else to mind now.

Again (Rec., 652):

Q Did you get the money back for your filing fees?

A. Yes, sir.

Q. Who gave it to——

A. Mr. Gesner gave me a check for it on the Prineville Bank.

Q. Did Crane get his?

A. Yes.

Q. Did you see him get it?

A. Yes, sir.

Q. How did he get his?

A. He got it by check, the same as I did.

Q. Was that right there in the office?

A. Yes, sir.

Q. Was Williamson present?

A. Yes, sir.

Q. How were the checks signed?

A. I think by Williamson and Gesner.

Williamson endeavored to maintain that he was not present on this occasion (Rec., 479, 480).

Campbell Duncan testified that after his notice for making final proof was published Gesner came down to the livery stable, where he worked, and told him to go with him to his office; that he found Williamson at Gesner's office and was introduced to him by Gesner, and Gesner picked up a copy of the Oregonian and told him to read the article in it headed, "Hits the Sharks, Secretary Hitchcock on Public Lands, Points to Oregon Cases," and that after he had read it Gesner told him that he had better go and relinquish; that Hitchcock was mad (Rec., 546–549).

This was on a different occasion from that on which Crain and Gaylord went to Gesner's office to get their filing fees, though about the same time.

Williamson testified on making final proof of his claim, December 9, 1902, that the money with which to pay for his land was obtained "by gradual accumulations for some months past," when, in fact, the firm had no money on hand and had borrowed $3,000 or $5,000 with which to pay for these claims on December 5, 1902 (Rec., 501).

It is a significant fact that while Williamson's name was connected with Gesner's in all the proceedings with reference to these timber claims, and he was present on all critical occasions, that of Wakefield, who was a member of the firm until 1903 (Rec., 470), was never mentioned. The note

for the $6,000 "firm" loan, made December 15, 1903, was not signed by Wakefield, but simply by Williamson and Gesner, although the latter alleged that Wakefield was to have signed it (Rec., 441).

Without going into any further details, or adverting to the unsatisfactory and equivocal nature of Williamson's testimony generally, it would seem clear that there was enough evidence of his connection with the conspiracy to justify the court in letting his case go to the jury.

It is respectfully submitted that, if the court take jurisdiction of this case, the judgment of the District Court should be affirmed.

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WILLIAMSON *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

No. 90. Argued December 5, 6, 1907.—Decided January 6, 1908.

Where the writ of error is prosecuted directly from this court on constitutional grounds, but there are errors assigned as to other subjects, this court has jurisdiction to review the whole case if any constitutional question is adequate to the exercise of jurisdiction. *Burton* v. *United States*, 196 U. S. 283.

An objection taken by a member of Congress that he cannot be sentenced during his term of office on the ground that it would interfere with his constitutional privilege from arrest is not frivolous even though taken during recess of Congress, and such a claim involves a constitutional question sufficient to give this court jurisdiction to review the judgment by writ of error. *Burton* v. *United States*, 196 U. S. 283.

The jurisdiction of this court to review on direct writ of error depends on the existence of a constitutional question at the time when the writ of error is sued out, and even if that question subsequently and before the

case is reached becomes an abstract one, jurisdiction remains and this court must review the whole case.

If a sentence on a member of Congress is illegal when pronounced because in conflict with his constitutional privilege it does not become valid by the expiration of the term for which he was elected.

The words "treason, felony and breach of the peace" were used by the framers of the Constitution in § 6, Art. I, and should be construed, in the same sense as those words were commonly used and understood in England as applied to the parliamentary privilege, and as excluding from the privilege all arrests and prosecutions for criminal offenses, and confining the privilege alone to arrests in civil cases.

Under § 5440, Rev. Stat., the conspiracy to commit a crime against the United States is itself the offense without reference to whether the crime which the conspirators have conspired to commit is consummated, or agreed upon by the conspirators in all its details. And an indictment charging the accused with a conspiracy to commit the crime of subornation of perjury in proceedings for the purchase of public lands was held in this case to be sufficient, although the precise persons to be suborned, and the time and place of such suborning were not particularized.

On the trial of one charged with conspiracy to commit a crime against the United States in connection with the purchase of public lands, testimony showing the character of the lands and an attempt by the accused to acquire state lands is competent as tending to establish guilty intent, purpose, design or knowledge, and is admissible if the trial judge so limits its application as to prevent it from improperly prejudicing the accused by showing the commission of other crimes. *Holmes* v. *Goldsmith*, 147 U. S. 164.

The rule that where it plainly appears in a criminal case that there is no evidence justifying conviction this court will so hold, despite a failure to request an instruction for acquittal, does not apply to a case where it is not certified, and this court is not otherwise satisfied, that the bill of exceptions contains the entire evidence, or where the bill of exceptions recites that the plaintiff offered evidence to go to the jury on every material allegation in the indictment.

While one honestly following advice of counsel, which he believes to be correct, cannot be convicted of crime which involves willful and unlawful intent even if such advice were an inaccurate construction of the law, no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed advice of counsel.

In a criminal case doubt must be resolved in favor of the accused and in this case, *held*, that an indictment for conspiracy to suborn perjury related to statements under § 2 of the Timber and Stone Act and not in respect to making of final proofs.

Under the Timber and Stone Act of June 3, 1878, 20 Stat. 89, an applicant is not required, after he has made his preliminary sworn statement concerning the *bona fides* of his application and the absence of any contract

or agreement in respect to the title, to additionally swear to such facts on final proof, and a regulation of the Land Commissioner exacting such additional statement at the time of final hearing is invalid.

While Congress has given the Land Commissioner power to prescribe regulations to give effect to the Timber and Stone Act, the rules prescribed must be for the enforcement of the statute and not destructive of the rights which Congress has conferred by the statute.

THE facts are stated in the opinion.

Mr. Charles A. Keigwin and *Mr. Charles A. Douglas*, with whom *Mr. W. B. Matthews* and *Mr. E. B. Sherrill* were on the brief, for plaintiff in error:

Plaintiff in error, being at the time of the trial a member of the House of Representatives of the United States, was not subject to arrest except for treason, felony or breach of the peace. Constitution U. S., Art. I, § 6.

Felonies, in the sense of the Constitution and of Federal statutes, are only such offenses as were felonies at common law or so declared by statute. *Reagan* v. *United States*, 157 U. S. 301; *Bannon* v. *United States*, 156 U. S. 464. So as to conspiracy, which is not a felony simply because it is an infamous offense. *Bannon* v. *United States, supra; Mackin* v. *United States*, 117 U. S. 348; *Ex parte Wilson*, 114 U. S. 417.

The phrase "breach of the peace" means only actual breaches of the peace, offenses involving violence or public disturbance. As to other misdemeanors, the parliamentary privilege applies, as in libel. *Rex* v. *Wilkes*, 2 Wilson, 151; *Ware* v. *Circuit Judge*, 75 Michigan, 488; *Estes* v. *State*, 2 Humphrey, 496.

The constitutional immunity from arrest includes immunity from imprisonment, save in the cases excepted. The arrest is prohibited, not because a mere arrest is likely to impair the discharge of legislative duty, but because it implies and leads to imprisonment which does have that effect.

An indictment which charges a conspiracy between two or more persons to solicit or attempt to suborn other persons, not parties to the conspiracy, to commit perjury, does not charge a conspiracy to commit an offense against the United

States. It is not an offense against the United States to solicit or attempt to suborn another person to commit perjury.

There are no common law offenses against the United States; an offense, to be indictable in the Federal courts, must be one created and defined by act of Congress. *United States* v. *Hudson*, 7 Cranch, 32; *State* v. *Wheeling Bridge Co.*, 13 How. 563; *United States* v. *Britton*, 108 U. S. 193. An indictment under cl. 1 of § 5440, Rev. Stat., must allege, as the object of the conspiracy, a statutory offense against the United States. *United States* v. *Payne*, 22 Fed. Rep. 426; *Re Wolf*, 27 Fed. Rep. 611; *United States* v. *Adler*, 49 Fed. Rep. 736; *United States* v. *Taffe*, 86 Fed. Rep. 113; *United States* v. *Melfi*, 118 Fed. Rep. 899; *United States* v. *Britton*, 108 U. S. 193.

At common law, subornation of perjury is the offense of procuring a man to take a false oath, amounting to perjury, who actually takes such oath. 1 Hawkins P. C., Curw. ed., 435; 2 Bishop on Criminal Law, § 1197.

By § 5393, Rev. Stat., it is provided that "Every person who procures another to commit any perjury is guilty of subornation of perjury." The offense against the United States constituted by this section is identical with the common law crime of subornation of perjury. It is essential, under this section, as at the common law, that perjury shall in fact have been committed. *United States* v. *Dennee*, 3 Woods, 39; *United States* v. *Wilcox*, 3 Blatchf. 393; *United States* v. *Evans*, 19 Fed. Rep. 912; *United States* v. *Howard*, 132 Fed. Rep. 325; *United States* v. *Cobban*, 134 Fed. Rep. 290.

If an actual attempt to suborn the commission of perjury does not constitute an offense against the United States, a conspiracy by two or more persons to solicit or to attempt to suborn other persons to commit perjury is not a conspiracy to commit an offense against the United States, and is not punishable under § 5440, Rev. Stat.

The ruling of the court that perjury at the final proof was within the averments of the indictment was prejudicial error.

The charge is limited to alleged perjury in the preliminary

written statements. The introduction of evidence showing perjury in the final proofs was an attempt to prove the commission of another crime than that set out in the indictment. This independent offense, if committed at all, was committed by strangers to the conspiracy.

An officer, having by statute power to prescribe regulations for the conduct of his official business, may enforce the same by his official authority; but he cannot make the disregard of his requirements a criminal offense. *United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Manion*, 44 Fed. Rep. 800; *United States* v. *Bedgood*, 49 Fed. Rep. 54; *United States* v. *Blasingame*, 116 Fed. Rep. 654; *United States* v. *Maid*, 116 Fed. Rep. 650; *United States* v. *Howard*, 37 Fed. Rep. 666.

The applicants had the right to sell, or to contract to sell, the lands at any time after application made, whether before or after final proof. The assumption to the contrary, upon which the whole theory of the possibility of perjury in the final proof is made to rest, is wholly unfounded upon any provision of the statute, contrary to the clear implication of the act of 1878, to the general principles of public-land law on the subject, and the decisions of this court.

In the absence of some express statutory inhibition, any right or claim under the public-land laws is assignable at any stage of its development. *Thredgill* v. *Pintard*, 12 How. 24; *Sparrow* v. *Strong*, 3 Wall. 97; *Lamb* v. *Davenport*, 18 Wall. 307.

A prohibition against such assignment will not be extended by construction to apply at a later stage of the proceeding than is made necessary by the words of the statute. *Myers* v. *Croft*, 13 Wall. 291. Nor can such a prohibition in another act in *pari materia* be read into an act in which no such prohibition is inserted by the legislature. *French* v. *Spencer*, 21 How. 228; *Maxwell* v. *Moore*, 22 How. 185.

The right to make a soldier's additional homestead entry is assignable, although an original homestead is not. *Webster* v. *Luther*, 163 U. S. 331; *Barnes* v. *Poirier*, 27 U. S. App. 500. See also *Adams* v. *Church*, 193 U. S. 510.

The Attorney General and *Mr. William R. Harr*, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for defendant in error:

The writ of error should be dismissed for want of jurisdiction. There is not now and never has been, properly speaking, a constitutional question involved in this case.

The mere assertion of a constitutional privilege, without color of ground to support it, is not sufficient to confer jurisdiction on this court to review the judgment of the Circuit Court. *Lampasas* v. *Bell*, 180 U. S. 282. See also *Water Co.* v. *Newburyport*, 193 U. S. 561, 576; *Railroad Co.* v. *Castro*, 204 U. S. 453, 455; *Kent* v. *Porto Rico*, *ante*, p. 113.

Even if the offense is not included within the exception to the privilege, and the imposition of sentence would amount to an arrest, color for the assertion of such privilege exists only when a Senator or Representative is threatened with arrest while in attendance at the session of their respective Houses or in going to and returning from the same. The contention that the privilege extends to freedom from arrest two months before Congress will meet, is frivolous, and could have been made for jurisdictional purposes only.

Sentence is not an arrest. At most it is but an order for arrest, although generally followed in this country by a warrant of commitment. Bishop's New Crim. Pro., 4th ed., § 1337. An unexecuted order for arrest is not in itself an arrest, and in this case the sentence, even treating it as such an order, was suspended during the entire time that plaintiff in error was a member of Congress.

The privilege of immunity extends to civil arrests only, and does not apply to any indictable offense. 1 Hartsell's Precedents of Proceedings in House of Commons, 2, 40, 65, 66; *Wilkinson* v. *Boulton*, 1 Levinz, 163; *Mr. Long Wellesley's Case*, 2 Rus. & Myl. 639, 664, 665; *Rawlins* v. *Ellis*, 10 Jurist, pt. 1, p. 1039; Bowyer's Com. on Const. Law of Eng., 2d ed., p. 84; May's Law of Parliament, 145.

Actual personal violence is not an essential element of breach

of the peace, but any conduct destructive of peace and good morals is sufficient to establish the offense. *People* v. *Rounds*, 35 N. W. Rep. 77, 79; *S. C.*, 67 Michigan, 482; *Davis* v. *Burgess*, 20 N. W. Rep. 540, 542; *S. C.*, 54 Michigan, 514; Bishop's Crim. Law, 7th ed., § 945; *Dunn* v. *The Queen*, 12 Ad. & Ellis, N. S. 1031, 1039, note; *O'Connell* v. *The Queen*, 11 Clark & Fin. 155, 251.

Conspiracy to commit subornation of perjury is an offense against the United States. *Clune* v. *United States*, 159 U. S. 595; *Callan* v. *Wilson*, 127 U. S. 540, 555.

The indictment is sufficient; it states the object of the conspiracy with all the precision and detail as to time, place, and other details that are necessary in indictments for the commission of such offense. *Ching* v. *United States*, 118 Fed. Rep. 540; *United States* v. *Stevens*, 44 Fed. Rep. 141; *United States* v. *Wilson*, 60 Fed. Rep. 890.

When the object of the conspiracy is an act in itself unlawful, the means by which it was to be accomplished need not be set out in the indictment. *Rex* v. *Eccles*, 1 Leach's Crown Cases, 274; *Thomas* v. *People*, 113 Illinois, 531; *People* v. *Clark*, 10 Michigan, 310; *People* v. *Bird*, 126 Michigan, 631; *People* v. *Arnold*, 46 Michigan, 268, 271. See also *Pettibone* v. *United States*, 148 U. S. 197, 203.

While not provided by the express words of the statute, the Timber and Stone Act, in purpose and intent, prohibits an applicant, at any time before the completion of his entry, from making any contract or agreement by which the title he may acquire shall inure to the benefit of any other person, otherwise the expressed intention of the statute that the lands applied for should not inure to the benefit of any other person, and that it should not be sold in quantities exceeding one hundred and sixty acres to any one person, would be defeated. *United States* v. *Budd*, 144 U. S. 163.

As it is the policy of the Timber and Stone Act to withhold the power of alienation from the person desiring to purchase the land until he has completed his entry, the Land Commis-

sioner must not only possess authority to make rules to that effect, but it is his duty to make and enforce them for the protection of the Government, and the courts of the United States will take judicial notice of such rules. *Caha* v. *United States*, 152 U. S. 221; *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 309.

The regulations made by the Commissioner of the General Land Office for the purpose of carrying into effect the Timber and Stone Act in its true intent and purpose merely provided a place and an occasion and opportunity where perjury might be committed. *United States* v. *Bailey*, 9 Pet. 238; *Adams* v. *Church*, 193 U. S. 510, discussed and distinguished.

MR. JUSTICE WHITE delivered the opinion of the court.

This writ of error to review a criminal conviction is prosecuted directly from this court upon the assumption that rights under the Constitution are involved. The errors assigned, however, relate not only to such question but also to many other subjects. If there be a constitutional question adequate to the exercise of jurisdiction, the duty exists to review the whole case. *Burton* v. *United States*, 196 U. S. 283.

The constitutional question relied on thus arose:

On February 11, 1905, Williamson, plaintiff in error, while a member of the House of Representatives of the United States, was indicted with two other persons for alleged violations of Rev. Stat. § 5440, in conspiring to commit the crime of subornation of perjury in proceedings for the purchase of public land under the authority of the law commonly known as the Timber and Stone Act. The defendants were found guilty in the month of September, 1905. On October 14, 1905, when the court was about to pronounce sentence, Williamson—whose term of office as a member of the House of Representatives did not expire until March 4, 1907—protested against the court passing sentence upon him, and especially to any sentence of imprisonment, on the ground that thereby

he would be deprived of his constitutional right to go to, attend at and return from the ensuing session of Congress. The objection was overruled and Williamson was sentenced to pay a fine and to imprisonment for ten months. Exceptions were taken both to the overruling of the preliminary objection and to the sentence of imprisonment. Upon these exceptions assignments of error are based, which it is asserted present a question as to the scope and meaning of that portion of Article I, section 6, clause 1, of the Constitution, relating to the privilege of Senators and Representatives from arrest during their attendance on the session of their respective Houses, and in going to and returning from the same.

At the threshold it is insisted by the Government that the writ of error should be dismissed for want of jurisdiction. This rests upon the proposition that the constitutional question urged is of such a frivolous character as not to furnish a basis for jurisdiction, or if not frivolous at the time when the sentence was imposed, it is now so. The first proposition assumes that it is so clear that the constitutional privilege does not extend to the trial and punishment during his term of office of a Congressman for crime that any assertion to the contrary affords no basis for jurisdiction. It is not asserted that it has ever been finally settled by this court that the constitutional privilege does not prohibit the arrest and punishment of a member of Congress for the commission of any criminal offense. The contention must rest therefore upon the assumption that the text of the Constitution so plainly excludes all criminal prosecutions from the privilege which that instrument accords a Congressman as to cause the contrary assertion to be frivolous. But this conflicts with *Burton* v. *United States*, *supra*, where, although the scope of the privilege was not passed upon, it was declared that a claim interposed by a Senator of the United States of immunity from arrest in consequence of a prosecution and conviction for a misdemeanor involved a constitutional question of such a character as to give jurisdiction to this court by direct writ

of error. It is said, however, that this case differs from the *Burton case*, because there the trial and conviction was had during a session of the Senate, while here, at the time of the trial, conviction and sentence Congress was not in session, and therefore to assert the protection of the constitutional provision is to reduce the claim "to the point of frivolousness." This, however, but assumes that, even if the constitutional privilege embraces the arrest and sentence of a member of Congress for a crime like the one here involved, it is frivolous to assert that the privilege could possibly apply to an arrest and sentence at any other time than during a session of Congress, even although the inevitable result of such arrest and sentence might be an imprisonment which would preclude the possibility of the member attending an approaching session. We cannot give our assent to the proposition. Indeed, we think, if it be conceded that the privilege which the Constitution creates extends to an arrest for any criminal offense, such privilege would embrace exemption from any exertion of power by way of arrest and prosecution for the commission of crime, the effect of which exertion of power would be to prevent a Congressman from attending a future as well as a pending session of Congress. The contention that although there may have been merit in the claim of privilege when asserted it is now frivolous because of a change in the situation, is based upon the fact that at this time the Congress of which the accused was a member has ceased to exist, and, therefore, even if the sentence was illegal when imposed, such illegality has been cured by the cessation of the constitutional privilege. But, even if the proposition be conceded, it affords no ground for dismissing the writ of error, since our jurisdiction depends upon the existence of a constitutional question at the time when the writ of error was sued out, and such jurisdiction, as we have previously said, carries with it the duty of reviewing any errors material to the determination of the validity of the conviction. It hence follows that, even if the constitutional question as asserted is now "a mere abstraction," that

fact would not avail to relieve us of the duty of reviewing the whole case, and hence disposing of the assignments of error which are addressed to other than the constitutional question. Besides, we do not consider the proposition well founded, for, if at the time the sentence was imposed it was illegal because in conflict with the constitutional privilege of the accused, we fail to perceive how the mere expiration of the term of Congress for which the member was elected has operated to render that valid which was void because repugnant to the Constitution.

We come, then, to consider the clause of the Constitution relied upon in order to determine whether the accused, because he was a member of Congress, was privileged from arrest and trial for the crime in question, or, upon conviction, was in any event privileged from sentence, which would prevent his attendance at an existing or approaching session of Congress.

The full text of the first clause of section 6, Article I, of the Constitution is this:

"SEC. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

If the words extending the privilege to all cases were unqualified, and therefore embraced the arrest of a member of Congress for the commission of any crime, we think, as we have previously said, they would not only include such an arrest as operated to prevent the member from going to and returning from a pending session, but would also extend to prohibiting a court during an interim of a session of Congress from imposing a sentence of imprisonment which would prevent him from attending a session of Congress in the future. But the question is not what would be the scope of the words

"all cases" if those words embraced all crimes, but is, what is the scope of the qualifying clause—that is, the exception from the privilege of "treason, felony and breach of the peace." The conflicting contentions are substantially these: It is insisted by the plaintiff in error that the privilege applied because the offense in question is confessedly not technically the crime of treason or felony and is not embraced within the words "breach of the peace," as found in the exception, because "the phrase 'breach of the peace' means only actual breaches of the peace, offenses involving violence or public disturbance." This restricted meaning, it is said, is necessary in order to give effect to the whole of the excepting clause, since, if the words "breach of the peace" be broadly interpreted so as to cause them to embrace all crimes, then the words treason and felony will become superfluous. On the other hand, the Government insists that the words "breach of the peace" should not be narrowly construed, but should be held to embrace substantially all crimes, and therefore, as in effect, confining the parliamentary privilege exclusively to arrest in civil cases. And this is based not merely upon the ordinary acceptation of the meaning of the words, but upon the contention that the words "treason, felony and breach of the peace," as applied to parliamentary privilege, were commonly used in England prior to the Revolution and were there well understood as excluding from the parliamentary privilege all arrests and prosecutions for criminal offenses; in other words, as confining the privilege alone to arrests in civil cases, the deduction being that when the framers of the Constitution adopted the phrase in question they necessarily must be held to have intended that it should receive its well understood and accepted meaning. If the premise upon which this argument proceeds be well founded, we think there can be no doubt of the correctness of the conclusion based upon it. Before, therefore, coming to elucidate the text by the ordinary principles of interpretation we proceed to trace the origin of the phrase "treason, felony and breach of the peace," as applied to parliamentary privilege, and to fix the meaning

of those words as understood in this country and in England prior to and at the time of the adoption of the Constitution. In the Articles of Confederation (last clause of Article V) it was provided:

"Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrest and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace."

In article V of "Mr. Charles Pinckney's Draft of a Federal Government" it was provided as follows (Elliott's Deb., p. 146):

"In each house a majority shall constitute a quorum to do business. Freedom of speech and debate in the legislature shall not be impeached or questioned, in any place out of it; and the members of both houses shall, in all cases except for treason, felony, or breach of the peace, be free from arrest during their attendance on Congress, and in going to and returning from it. . . ."

The propositions offered to the convention by Mr. Pinckney with certain resolutions of the convention were submitted to a Committee of Detail for the purpose of reporting a constitution. Section 5 of Article VI of the draft of Constitution reported by this committee was as follows (Elliott's Debates, p. 227):

"SEC. 5. Freedom of speech and debate in the legislature shall not be impeached or questioned in any court or place out of the legislature; and the members of each house shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at Congress, and in going to and returning from it."

The clause would seem not to have been the subject of debate. 3 Doc. Hist. of Constitution (Dept. of State, 1900), 500. In Elliott's Debates (p. 237) it is recited as follows:

"On the question to agree to the fifth section of the sixth article, as reported, it passed in the affirmative."

And, in the revised draft, the section was reported by the Committee of Revision exactly as it now appears (Elliott's Debates, p. 299).

The presence of the exact words of the exception as now found in the Constitution, in the Articles of Confederation, and the employment of the same words "treason, felony and breach of the peace," without discussion, in all the proceedings of the convention relating to the subject of the privileges of members of Congress, demonstrate that those words were then well known as applied to parliamentary privilege and had a general and well understood meaning, which it was intended that they should continue to have. This follows, because it is impossible to suppose that exactly like words without any change whatever would have been applied by all those engaged in dealing with the subject of legislative privilege, unless all had a knowledge of those words as applied to the question in hand and contemplated that they should continue to receive the meaning which it was understood they then had. A brief consideration of the subject of parliamentary privilege in England will, we think, show the source whence the expression "treason, felony and breach of the peace" was drawn, and leave no doubt that the words were used in England for the very purpose of excluding all crimes from the operation of the parliamentary privilege, and therefore to leave that privilege to apply only to prosecutions of a civil nature. We say this, although the King's Bench, in 1763 (*Rex* v. *Wilkes*, 2 Wils. 151), held that a member of Parliament was entitled to assert his privilege from arrest upon a charge of publishing a seditious libel, the court ruling that it was not a breach of the peace. But, as will hereafter appear, Parliament promptly disavowed any right to assert the privilege in such cases.

In Potter's Dwarris on Statutes, p. 601, reference is made to expressions of Lord Mansfield, advocating in 1770 the passage of a bill—which ultimately became a law—whose provisions greatly facilitated the prosecution of civil actions against members of Parliament, and restrained only arrests of their persons

in such actions. The remarks of Lord Mansfield having been made so shortly before the Revolution, and referring, as they undoubtedly did, to the decision in the *Wilkes case* (2 Wils. 151), are of special significance. Among other things he said:

"It may not be popular to take away any of the privileges of Parliament, for I very well remember, and many of your Lordships may remember, that not long ago the popular cry was for an extension of privileges, and so far did they carry it at that time that it was said that privilege protected members from criminal actions, and such was the power of popular prejudice over weak minds that the very decisions of some of the courts were tinctured with that doctrine. . . . The laws of this country allow no place or employment as a sanctuary for crime, and where I have the honor to sit as judge neither royal favor nor popular applause shall ever protect the guilty. . . . Members of both houses should be free in their persons in cases of civil suits, for there may come a time when the safety and welfare of this whole empire may depend upon their attendance in Parliament. God forbid that I should advise any measure that would in future endanger the state. But this bill has no such tendency. It expressly secures the persons of members from arrest in all civil suits."

Blackstone, in 1765, discussing the subject of the privileges of Parliament, says (Lewis's ed., *165):

"Neither can any member of either house be arrested and taken into custody, unless for some indictable offense, without a breach of the privilege of Parliament."

And, speaking of the writ of privilege which was employed to deliver the party out of custody when arrested in a civil suit, he said (p. 166):

"It is to be observed that there is no precedent of any such writ of privilege, but only in civil suits; and that the statute of 1 Jac. I, c. 13, and that of King William (which remedy some inconveniences arising from privilege of Parliament), speak only of civil actions. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable

crimes; or, as it has been frequently expressed, of treason, felony and breach (or surety) of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants, in any *crime* whatsoever, for all crimes are treated by the law as being *contra pacem domini regis*. And instances have not been wanting wherein privileged persons have been convicted of misdemeanors, and committed, or prosecuted to outlawry, even in the middle of a session; which proceeding has afterwards received the sanction and approbation of Parliament. To which may be added that a few years ago the case of writing and publishing seditious libels was resolved by both houses not to be entitled to privilege; and that the reasons upon which that case proceeded extended equally to every indictable offense."

The first volume of Hatsell's Precedents, published in April, 1776, is entitled as "relating to privilege of Parliament; from the earliest records to the year 1628: with observations upon the reign of Car. I, from 1628 to 4 January, 1641." The material there collected has been frequently employed in support of the statement that the terms "treason, felony and breach of the peace" were employed by the Commons in a broad and not in a restricted sense. And in the concluding chapter (V), after stating (4th ed., 205) "the principal view, which the House of Commons seems always to have had in the several declarations of their privileges," the author says (p. 206):

"Beyond this, they seem never to have attempted; there is not a single instance of a member's claiming the privilege of Parliament, to withdraw himself from the criminal law of the land: for offenses against the public peace they always thought themselves amenable to the laws of their country: they were contented with being substantially secured from any violence from the Crown, or its ministers; but readily submitted themselves to the judicature of the King's Bench, the legal court of criminal jurisdiction; well knowing that 'Privilege which is allowed in case of public service for the Commonwealth, must not be used for the danger of the Commonwealth;' or, as it is

expressed in Mr. Glynn's Report of the sixth of January, 1641, 'They were far from any endeavor to protect any of their members, who should be, in due manner, prosecuted according to the Laws of the Realm, and the Rights and Privileges of Parliament, for treason, or any other misdemeanor; being sensible, that it equally imported them, as well to see justice done against them that are criminous, as to defend the just Rights and Liberties of the Subjects, and Parliament of England.' "

May, in his treatise on the Law, Privileges, Proceedings and Usage of Parliament, first published in 1844, says (10th ed., p. 112):

"The privilege of freedom from arrest has always been limited to civil causes, and has not been allowed to interfere with the administration of criminal justice. In *Larke's case*, in 1429, the privilege was claimed, 'except for treason, felony or breach of the peace;' and in *Thorpe's case* the judges made exceptions to such cases as be 'for treason, or felony, or surety of the peace.' The privilege was thus explained by a resolution of the Lords, 18th April, 1626: 'That the privilege of this house is, that no peer of Parliament, sitting the Parliament, is to be imprisoned or restrained without sentence or order of the house, unless it be for treason or felony, or for refusing to give surety of the peace;' and again, by a resolution of the Commons, 20th May, 1675, 'that by the laws and usage of Parliament, privilege of Parliament belongs to every member of the House of Commons, in all cases except treason, felony and breach of the peace.'

"On the 14th April, 1697, it was resolved, 'That no member of this house has any privilege in case of breach of the peace, or forcible entries, or forcible detainers;' and in *Wilkes' case*, 29th November, 1763, although the Court of Common Pleas had decided otherwise, it was resolved by both houses,

" 'That privilege of Parliament does not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the ordinary course of laws in the speedy

and effectual prosecution of so heinous and dangerous an offence.'

" 'Since that time,' said the committee of privileges, in 1831, 'it has been considered as established generally, that privilege is not claimable for any indictable offence.'

"These being the general declarations of the law of Parliament, one case will be sufficient to show how little protection is practically afforded by privilege, in criminal offences. In 1815, Lord Cochrane, a member, having been indicted and convicted of a conspiracy, was committed by the Court of King's Bench to the King's Bench Prison. Lord Cochrane escaped, and was arrested by the marshal, whilst he was sitting on the privy councillor's bench, in the House of Commons, on the right hand of the chair, at which time there was no member present, prayers not having been read. The case was referred to the committee of privileges, who reported that it was 'entirely of a novel nature, and that the privileges of Parliament did not appear to have been violated, so as to call for the interposition of the house, by any proceedings against the marshal of the King's Bench.' "

See, also, Bowyer's Com. on Const. Law of England (2d ed.), p. 84.

In what is styled *Mr. Long Wellesley's Case*, decided in 1831, 2 Russ. and Mylne, 639, the party named had been taken into custody for clandestinely removing his infant daughter, a ward of the court, from the place where such ward was residing under authority of the court. The question for decision arose upon a motion to discharge the order for commitment "on the ground that, as a member of the House of Commons, he was protected from attachment by the privilege of Parliament." As stated in the report of the case, the committee of privileges of the House of Commons, which had the matter of the arrest of Mr. Wellesley under consideration, decided, p. 644, "that Mr. Long Wellesley's claim to be discharged from imprisonment by reason of privilege of Parliament ought not to be admitted." On the subject of the extent of the privilege, counsel,

who as *amicus curiæ* contended that the order of commitment was invalid, made an elaborate reference to authorities and pertinent statutes. Lord Chancellor Brougham, however, decided that privilege of Parliament was no protection against an attachment for what was in its nature a criminal contempt. Among other things he observed that upon principle members of Parliament could not be placed by privilege of Parliament above the law, and held (p. 665) "that he who has privilege of Parliament, in all civil matters, matters which whatever be the form are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege."

And by text-writers of authority in this country it has been recognized from the beginning that the convention which framed the Constitution, in adopting the words "treason, felony and breach of peace" as applicable to the privileges of a parliamentary body, used those words in the sense which the identical words had been settled to mean in England.

Story, in his treatise on the Constitution, speaking of the subject, says:

"SEC. 859. The next part of the clause regards the privilege of the members from arrest, except for crimes, during their attendance at the sessions of Congress, and their going to and returning from them. This privilege is conceded by law to the humblest suitor and witness in a court of justice; and it would be strange indeed if it were denied to the highest functionaries of the State in the discharge of their public duties. It belongs to Congress in common with all other legislative bodies which exist, or have existed in America since its first settlement, under every variety of government, and it has immemorially constituted a privilege of both houses of the British Parliament. It seems absolutely indispensable for the just exercise of the legislative power in every nation purporting to possess a free constitution of government, and it cannot be surrendered without endangering the public liberties as well as the private independence of the members.

* * * * * * * *

"SEC. 865. The exception to the privilege is, that it shall not extend to 'treason, felony, or breach of the peace.' These words are the same as those in which the exception to the privilege of Parliament is usually expressed at the common law, and were doubtless borrowed from that source. Now, as all crimes are offenses against the peace, the phrase 'breach of the peace' would seem to extend to all indictable offenses, as well those which are in fact attended with force and violence, as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order. And so, in truth, it was decided in Parliament, in the case of a seditious libel published by a member (Mr. Wilkes) against the opinion of Lord Camden and the other judges of the court of common pleas, and, as it will probably now be thought, since the party spirit of those times has subsided, with entire good sense and in furtherance of public justice. It would be monstrous that any member should protect himself from arrest or punishment for a libel, often a crime of the deepest malignity and mischief, while he would be liable to arrest for the pettiest assault or the most insignificant breach of the peace."

Cushing, in his treatise—first published in 1856—on the elements of the law and practice of legislative assemblies in the United States, declared (9th ed., § 546) that the Commons never went "the length of claiming any exemption from the operation of the criminal laws;" and the author closed a discussion of the cases to which the privilege of Parliament was applicable (§§ 559–563) by expressing an opinion "in favor of the broad rule which withdraws the protection of parliamentary privilege from offenses and criminal proceedings of every description." And, considering the privilege as affected by the Constitution of the United States and of the several States, he said:

"567. In the greater number of the constitutions it is expressly provided, that members shall be privileged from arrest, during their attendance at the session of their respective houses, and in going to and returning from the same, in all cases, ex-

cept 'treason, felony, and breach of the peace.' This it will be recollected is the form in which the privilege is stated by Sir Edward Coke, and in which it is usually expressed by the English writers on parliamentary law; and it was undoubtedly adopted in the constitutions as correctly expressing the parliamentary rule on the subject. The inaccuracy of the language has already been pointed out, and it has been shown, that, in England, the exception embraces all criminal matters whatsoever, and, of course, includes many cases which do not fall within the denomination either of treason, felony, or breach of the peace. The question, therefore, arises, whether the exception of treason, felony, or breach of the peace, being stated in express terms, in these constitutions, it is to be understood strictly, and confined to cases coming within the technical definition of these offenses, or whether it is used as a compendious expression to denote all criminal cases of every description. In favor of the latter opinion, it may be said, first, there can be no doubt, that the framers of these constitutions intended to secure the privilege in question upon as reasonable and intelligible a foundation, as it existed by the parliamentary and common law of England; in short, that as in a multitude of other cases, they intended to adopt, with the words, the full meaning which had been given to them by usage and authoritative construction; and, second, that the word *felony*, which alone gives rise to any doubt, 'has derived so many meanings from so many parts of the common law, and so many statutes in England, and has got to be used in such a vast a number of different senses, that it is now impossible to know precisely in what sense we are to understand it;' and, consequently, that unless it is allowed to have such a signification, as with the other words of the exception, will cover the whole extent of criminal matters, it must be rejected altogether for uncertainty, or, at least, restricted to a very few cases. These reasons, alone, though others might be added, are sufficient to establish the point, that the terms 'treason, felony, and breach of the peace,' as used in our constitutions, embrace

all criminal cases and proceedings whatsoever. In the Federal Government, therefore, and in the States above referred to, the privilege of exemption from legal process may be considered the same as it is in England."

Since from the foregoing it follows that the terms treason, felony and breach of the peace, as used in the constitutional provision relied upon, excepts from the operation of the privilege all criminal offenses, the conclusion results that the claim of privilege of exemption from arrest and sentence was without merit, and we are thus brought to consider the other assignments of error relied upon. They are, all but one, based on exceptions challenging the sufficiency of the indictment, and alleging the commission of material error in admitting and rejecting evidence, in refusing requested instructions and in the instructions given. The only assignment not based upon an exception taken at the trial asserts that it is so clearly shown by the record that there is no proof tending to establish the commission of the offense charged that it should be now so decided, even although no request to instruct the jury on that subject was made at the trial.

1. *As to the sufficiency of the indictment.*

With great elaboration it is insisted in argument that the indictment charges no crime, since there can be no such thing as a conspiracy to commit the offense of subornation of perjury. While the statutes of the United States cause every person who procures another to commit perjury to be guilty of subornation of perjury, it is said there is no punishment by statute, as at common law, for a mere attempt by an individual to induce the commission of perjury. This being so, the argument is that a charge of conspiracy to suborn, etc., perjury is in the nature of things but a charge of an attempt to suborn perjury, which amounts only to the charge of a conspiracy to do an act which is not a criminal offense. But the proposition wholly fails to give effect to the provisions of the conspiracy statute (Rev. Stat., § 5440), which clearly renders it criminal for two or more persons to conspire to commit any offense against the Uni-

ted States, provided only that one or more of the parties to the conspiracy do an act towards effecting the object of the conspiracy. In other words, although it be conceded, merely for the sake of argument, that an attempt by one person to suborn another to commit perjury may not be punishable under the criminal laws of the United States, it does not follow that a conspiracy by two or more persons to procure the commission of perjury, which embraces an unsuccessful attempt, is not a crime punishable as above stated. The conspiracy is the offense which the statute defines without reference to whether the crime which the conspirators have conspired to commit is consummated. And this result of the conspiracy statute also disposes of an elaborate argument concerning the alleged impossibility of framing an indictment charging a conspiracy to suborn perjury, since it rests upon the assumption that as the conspirators could not, in advance, know when they entered into the conspiracy that the persons would willfully swear falsely to what they and the conspirators knew to be false, there could be no conspiracy to suborn.

But even on the supposition that a valid indictment may be framed charging a conspiracy to commit subornation of perjury, the indictment in question, it is urged, is fatally defective by reason of an omission to directly particularize various elements, claimed to be essential to constitute the offense of perjury and other elements necessary to be averred in respect of the alleged suborners.

This is based upon the assumption that an indictment alleging a conspiracy to suborn perjury must describe not only the conspiracy relied upon, but also must, with technical precision, state all the elements essential to the commission of the crimes of subornation of perjury and perjury, which it is alleged is not done in the indictment under consideration. But in a charge of conspiracy the conspiracy is the gist of the crime, and certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy. Looking at the indict-

ment, it in terms charges an unlawful conspiracy and combination to have been entered into on a date and at a place named within the district where the indictment was found, and the object of the conspiracy is stated to be the suborning of a large number of persons to go before a named person, stated to be a United States Commissioner of the District of Oregon, and in proceedings for the entry and purchase of land in such district under the timber and stone acts, make oath before the official that the lands "were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons, respectively, and that they had not directly or indirectly made any agreement, or contract in any way or manner, with any other person or persons whomsoever, by which the titles which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person except themselves, when, in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith, appropriate such lands to their own exclusive use and benefit respectively, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, by which the titles which they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, then and before then engaged in the business of sheep raising in said county; the matters so to be stated, subscribed, and sworn by the said persons being material matters under the circumstances, and matters which the said persons so to be suborned, instigated, and procured, and the said John Newton Williamson, Van Gesner, and Marion R. Biggs would not believe to be true; and the said Marion R. Biggs, United States Commissioner as aforesaid, when administering such oaths to those persons, being an officer and person authorized by law

of the said United States to administer the said oaths, and the said oaths being oaths administered in cases where a law of the said United States would then authorize an oath to be administered."

These allegations plainly import, and they are susceptible of no other construction, than that the unlawful agreement contemplated a future solicitation of individuals to enter lands, who in so doing would necessarily knowingly state and subscribe under oath material false statements as to their purpose in respect to entering the land, etc., and known to be such by the conspirators. There is no reason to infer that the details of the unlawful conspiracy and agreement are not fully stated in the indictment, and it may, therefore, be assumed that the persons who were to be suborned, and the time and place of such subornation, had not been determined at the time of the conspiracy, except as might be inferred from a purpose to procure the persons to be suborned to come before the United States Commissioner for the District of Oregon named in an indictment. It was not essential to the commission of the crime that in the minds of the conspirators the precise persons to be suborned, or the time and place of such suborning, should have been agreed upon, and as the criminality of the conspiracy charged consisted in the unlawful agreement to compass a criminal purpose, the indictment, we think, sufficiently set forth such purpose. The assignments of error which assailed the sufficiency of the indictment are, therefore, without merit.

2. Numerous exceptions were taken, *a*, to the admission of evidence as to the understanding of the applicants concerning their arrangement with Gesner, one of the accused, and the purpose of the applicants in applying for the land; *b*, to the admission of the final proofs, which embraced a sworn statement, made pursuant to the requirements of a regulation adopted by the Commissioner of the General Land Office declaring the *bona fides* of the applicant, and that at that period he had made no contract or agreement to dispose of the land;

and, *c*, to evidence respecting the character of the land and concerning an attempt to acquire, and the acquisition by like wrongful methods of state school lands located near the Government timber lands in question.

As we shall hereafter have occasion to consider the instructions of the court concerning the scope of the indictment as to the final proofs and the law applicable to that subject, we put out of view for the moment the objections just mentioned, under subdivision *b*, relating to the final proofs and the intention of the applicants in respect to the land, at the time such final proof was made, and therefore presently consider the objections in so far only as they concern the other subjects.

The issue being the existence of a conspiracy to suborn various persons to commit perjury in relation to declarations to be made under the timber and stone act as to the purpose for which they desired to acquire land, etc., and as it is conceded that no formal contracts were executed between the alleged conspirators and the proposed entrymen, and the alleged understandings were of an ambiguous nature, and proof of the conspiracy depended upon a variety of circumstances going to show motive or intent, we think it was proper to permit the interrogation of the entrymen concerning their understanding of the arrangement with Gesner and their intention at the time when they made their preliminary declarations, as the testimony was relevant to the question of the nature and character of the dealings of the entrymen with the alleged conspirators, and bore on the question of the purpose or motive which influenced the making of the sworn statement required by law as a condition precedent to the purchase of the land. As it was insisted that the motive which impelled the formation of the conspiracy was the desire to acquire a large tract of land for sheep-grazing purposes, which acquisition had become necessary by reason of the fact that a rival had obtained a leasehold interest in a considerable portion of the land which Gesner and Williamson had theretofore used in their sheep-

raising business, we think the testimony as to the character of the timber lands in respect to suitability for grazing purposes, etc., and an attempt to acquire and the acquisition of state school lands was, we think, also competent as tending to establish on the part of the conspirator guilty intent, purpose, design or knowledge.

The contention that the proof on the subjects just stated should not have been admitted, because it tended to show the commission of crimes other than those charged in the indictment, and consequently must have operated to prejudice the accused, is, we think, without merit, particularly as the trial judge, in his charge to the jury, carefully limited the application of the testimony so as to prevent any improper use thereof.

The conclusion above expressed as to the admissibility of the evidence objected to is elucidated by *Holmes* v. *Goldsmith*, 147 U. S. 150, 164, where it was said:

"As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. 'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.'

"The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

3. The remaining assignments relate to the refusal to give

requested instructions and to portions of the charge of the court. Many of the requested instructions, however, are so clearly without merit, because in effect covered by the charge as given that we do not deem it necessary to particularly notice them. The only subjects which we think are sufficiently important to require express notice are:

a. That, even although no request was made to instruct the jury on the whole evidence to render a verdict of not guilty, nevertheless it should now be held that the record establishes such an entire absence of proof tending to show guilt that it should be so declared.

b. That prejudicial error was committed by the trial court in refusing requested instructions to the effect that the jury should acquit if they found that the defendants acted in good faith under the advice of counsel and in the belief of the lawfulness of their conduct.

c. Exceptions in respect to the instruction given by the court that the indictment covered perjury in the matter of the final proofs, and in instructing the jury that they might convict if satisfied by the evidence, beyond a reasonable doubt, that the defendants intended that the persons who might be procured or induced to make entries of lands should willfully and deliberately commit perjury in particulars stated at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner, and in effect charging that a sworn statement made at the time of final proof concerning the purpose for which the land was sought to be purchased, etc., would constitute perjury if the oath so taken, although not expressly embraced in the statute, was required by a regulation of the Commissioner of the General Land Office, because such regulation had the force and effect of law. We shall consider the propositions *seriatim*.

a. Whilst it has been settled that in a criminal case where it plainly appeared that there was no evidence whatever justifying conviction, this court would so hold, despite the

failure to request an instruction of acquittal (*Wiborg* v. *United States*, 163 U. S. 632; *Clyatt* v. *United States*, 197 U. S. 207), this case affords no occasion for applying the rule, because it is not certified that the bill of exceptions contains the entire evidence, and we are not otherwise satisfied that it does, and further, because it is recited in the bill of exceptions that "the plaintiff offered evidence during said trial sufficient to go to the jury tending to prove each and every material allegation of the indictment."

b. Without attempting to review in detail the requested charges concerning motive and intent and the effect of advice of counsel, we think the trial judge in instructing the jury on the subject went as far in favor of the accused as it was possible for him to go consistently with right, and therefore there is no ground for complaint as to the failure to give the requested charges. The court, after having fully and carefully instructed the jury as to the operative effect of good faith in relieving the defendants from the charge made against them, in express terms noticed the question of the advice of counsel and said:

"Having now placed before you the timber and stone law and what it denounces, and what it permits, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of loaning money to applicants under it, and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves willful and unlawful intent; even if such advice were an inaccurate construction of the law. But, on the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel."

c. As the contentions under this head concern the instructions of the court in relation to the final proof and the effect of the regulations of the Commissioner of the General Land

Office relative to the subject, the exceptions taken to the charge in relation to the matter are in the margin.[1]

Further, as in order to dispose of these objections, it be-

[1] The defendants, each of them, also excepted to the giving of said instruction hereinbefore set forth, reading as follows: "Now, when the sworn statement is filed, the register posts a notice of the application, embracing a description of the land, in his office for a period of sixty days and furnishes the applicant a copy of the same for publication in a newspaper published nearest the location of the premises, for a like period of time. And it is provided by law, and by regulation duly made by proper authority and having the force and effect of law, that, after the expiration of said sixty days, the person or claimant desiring to purchase shall furnish to the register of the land office satisfactory evidence, among other things, that notice of the application prepared by the register was duly published in a newspaper as required by the law; that the land is of the character contemplated in the act; that the applicant has not sold or transferred his claim to the land since making his sworn statement, and has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whomsoever, by which the title he may acquire from the Government may inure, in whole or in part, to the benefit of any person except himself, and that he makes his entry in good faith for the appropriation of the land exclusively for his own use and not for the use and benefit of any other person;" as not the law and misleading and directing the attention of the jury to a matter not charged in the indictment.

Defendants, each of them, also then and there excepted to the giving of said instruction as hereinbefore set forth, reading as follows: "But, as heretofore said, if he is not in good faith and has directly or indirectly made any agreement or contract in any way or manner with any persons by which the title he may acquire from the United States shall inure in whole or in part to the benefit of any persons except himself, then he commits perjury in making his sworn statement, and in making a deposition that he has not done those things, and any person who knowingly and willfully procures and instigates the person to make such sworn statement or deposition is guilty of subornation of perjury," and especially to the words in said paragraph, "and in making a deposition that he has not done those things," upon the ground that the same is not the law and misleading and directs the attention of the jury to a matter not charged in the indictment.

Defendants also except to the giving of the instruction hereinbefore set forth, which reads as follows: "The essential questions, then, for your determination are, does the evidence show, beyond a reasonable doubt, that Williamson, Gesner and Biggs, or two of them, knowingly and intentionally entered into an agreement or combination to induce or procure persons to apply to purchase and enter the lands as alleged, or some part of the lands charged in the indictment, as lands subject to entry under the timber and stone act, after having first come to an agreement or under-

comes necessary to consider not only the scope of the indictment, but moreover to construe the Timber and Stone Act, and, it may be, to determine the validity of the regulation of the General Land Office heretofore referred to, the material portions of the act are in the margin,[1] as well as the regulation in question.

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standing with such persons that they would convey the title which they might acquire to Williamson and Gesner, or either of them, and, next, does the evidence satisfy you beyond a reasonable doubt that these defendants, so combining and agreeing, intended that the persons, or some of the persons, whom they might procure or induce to make such entries should willfully and deliberately, in making their sworn statements or applications to purchase such lands at the time of making the first paper called a sworn statement or at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner on applying to purchase such lands, commit perjury by swearing falsely that their applications were not made on speculation, but in good faith to appropriate the lands to the exclusive use and benefit of the applicant or applicants, and that the applicant or applicants had not, directly or indirectly, made any agreement or contract in any way or manner by which the title to be acquired from the United States should inure in whole or in part to the benefit of any persons other than himself or herself," and especially to the words therein "or some of the persons," and also to the words "or at the time of making their depositions or sworn statements when they made their final proofs before the United States Commissioner," as misleading and not the law and applying to a matter not charged in the indictment and variant from said indictment.

[1] TIMBER AND STONE ACT.

(Approved June 3, 1878, 20 Stat. 89.)

CHAP. 151.—An Act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the States of California, Oregon, and Nevada and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intentions to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided*, That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the

Contenting ourselves with referring to the quotation already made from the indictment, we are of opinion that the particular false swearing to which the indictment related was alone the

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improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education or other purposes: *And provided further*, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have

verified written statement provided for in § 2 of the act to be made on applying to purchase the land, and therefore the indictment did not embrace a charge concerning a statement

been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

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Circular from the General Land Office Showing the Manner of Proceeding to Obtain Title to Public Lands under the Homestead, Desert Land, and Other Laws, issued July 11, 1899, p. 46:

"11. The evidence to be furnished to the satisfaction of the register and receiver at time of entry, as required by the third section of the act, must be taken before the register and receiver, and will consist of the testimony of claimant, corroborated by the testimony of two disinterested witnesses. The testimony will be reduced to writing by the register and receiver upon the blanks provided for the purpose, after verbally propounding the questions set forth in the printed forms. The accuracy of affiant's information and the *bona fides* of the entry must be tested by close and sufficient oral examination. The register and receiver will especially direct such examination to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure, in whole or in part, to the benefit of any person or persons except himself. They will certify to the fact of such oral examination, its sufficiency, and his satisfaction therewith."

or deposition under oath required to be made by any regulation of the Commissioner of the General Land Office, after the publication of the notice, and when the period had arrived for final action by the land office on the application to purchase. It seems to us clear that the indictment was thus restricted, since all the language in it speaks as of the time of the first statement, no reference is made to any regulation of the Commissioner supplementing the statute in any particular, and each of the nineteen overt acts charged to have been committed exclusively relates to the statement required by § 2, and to none other. We are of opinion that the elaborate argument made by the Government concerning the use in the indictment of the words, declarations and depositions can serve only to suggest ambiguity in the indictment, and possible doubt as to the meaning of the pleader. But, as of course, in a criminal case, doubt must be resolved in favor of the accused, we hold that the indictment does not charge a conspiracy to suborn perjury in respect of the making of the final proofs, and therefore that there was prejudicial error committed in the instructions to the jury on that subject which were excepted to.

As, however, the question which we have hitherto passed over concerning the admissibility of the final proof to show motive in making the original application may arise at a future trial, even although it be that the indictment charges only a conspiracy to suborn perjury as to the original application, we proceed to consider that subject. To do so it becomes necessary to determine whether the statute requires an applicant, after he has made his preliminary sworn statement concerning the *bona fides* of his application and the absence of any contract or agreement in respect to the title, to additionally swear to such facts after notice of his application has been published and the time has arrived for final action on the application. And this of course involves deciding whether the regulation of the Commissioner exacting such additional statement at the time of final hearing is valid. The inquiry concerns only the

second and third sections of the act. Turning to the second section, it will be seen that it requires the applicant to make a sworn statement, giving many particulars concerning the land—its unfitness for cultivation; its being uninhabited; the absence of mineral, etc.,—followed by the requirement that the applicant shall declare that he makes the application, not for the purpose of speculation, but in good faith, and that he intends to appropriate the land to his own exclusive use and benefit and that no agreement has been made, directly or indirectly, with any person or persons whatsoever by which the title to be acquired from the Government shall inure, in whole or in part, to any person except the applicant. And the section concludes by causing any false statement made in the sworn application to constitute the crime of perjury. Examining the third section, it will be seen that it provides that upon the filing of said statement, as provided in the second section, it shall be the duty of the local land officer to post a notice of the application in his office for sixty days, to furnish the applicant with a copy of such notice for publication, at the expense of the applicant, in the nearest newspaper for sixty days, and when such period has expired, on proof of the publication and of certain facts, which the statute expressly enumerates, the applicant shall, upon payment of the requisite charge, in the absence of a contest, be entitled to a patent for the land. Examining the items, which the statute requires the applicant to make proof of, after showing publication, it is apparent that while some of the things referred to in the prior section, and which are required to be stated in the preliminary proof are reiterated, all requirement is omitted of any statement regarding a speculative purpose on the part of the applicant, his *bona fides*, and his intention to acquire for himself alone. When the context of the statute is thus brought into view we are of the opinion that it cannot possibly be held, without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at the final hearing, of the declaration concerning his purpose in acquiring

title to the land, since to do so would be to construe the statute as including in the final hearing that which the very terms of the statute manifests were intended to be excluded therefrom. We say this, because as the third section reëxacts in the final application a reiteration of some of the requirements concerning the character of the land made necessary in the first application and omits the requirement as to the *bona fides*, etc., of the applicant, it follows under the elementary rule that the inclusion of one is the exclusion of the other, that the reexacting of a portion only of the requirements was equivalent to an express declaration by Congress that the remaining requirements should not be exacted at the final proof. And this becomes particularly cogent when the briefness of the act is considered, when the propinquity of the two provisions is borne in mind, a propinquity which excludes the conception that the legislative mind could possibly have overlooked in one section the provisions of a section immediately preceding, especially when in the last section some of the requirements of the prior section are reëxpressed and made applicable to the final statement. Indeed, we cannot perceive how, under the statute, if an applicant has in good faith complied with the requirements of the second section of the act, and pending the publication of notice, has contracted to convey, after patent, his rights in the land, his so doing could operate to forfeit his right. These conclusions are directly sustained by a recent ruling in *Adams* v. *Church*, 193 U. S. 510, construing the timber culture act. Under that law an applicant for entry was obliged, among other things, in making his application to swear to his good faith and to the absence of speculative purpose, in the exact words of the statute now under consideration. But in the timber culture act, as in the timber and stone act, the requirement was not reimposed in respect to the final proof. In the cited case the entryman who had complied with the statute in making his application had, between the date of the application and the making of final proof, disposed of his right, and the question was whether by so doing he had for-

feited his claim. In deciding adversely to the contention that he had the court said (p. 516):

"But as the law does not require affidavit before final certificate that no interest in the land has been sold, we perceive no reason why such contract, as was found to exist by the Supreme Court of Oregon, would vitiate the agreement to convey after the certificate is granted and the patent issued. If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law. *Myers* v. *Croft*, 13 Wall. 291."

It is elaborately insisted on behalf of the Government that there is a difference between the timber culture act and the timber and stone act, resulting from the fact that in the one case in the interim between the entry and the final proof a long time must elapse and much is required to be done by the applicant, while in the other a short time intervenes and substantially nothing is required to be done. But this reasoning, in effect, assails the wisdom of Congress in omitting the requirement in the act under consideration and affords no ground for inserting in the act requirements which Congress has, by express intendment, excluded therefrom. Besides, the weakness of the argument becomes apparent when it is borne in mind that the timber and stone act and the timber culture act were enacted by the same Congress and with only a few days' interval between the two.

It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which an entryman would be compelled

to do that at the final hearing which the act of Congress must be considered as having expressly excluded in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it. As observed in *Adams* v. *Church*, *supra*, at p. 517: "To sustain the contention . . . would be to incorporate . . . a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject." True it is that in the concluding portion of § 3 of the timber and stone act it is provided that "effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office." But this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred. As then there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit and had full power to dispose *ad interim* of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant, even under the broad rule which we have previously in this case applied, and therefore that error was committed not alone in instructing the jury that the indictment covered or could cover the procurement of perjury in connection with the final proof, and that the jury might base a conviction thereon, but in admitting the final proof as evidence tending to show the alleged illegal purpose in the primary application for the purchase of the lands.

Reversed and remanded.

MR. JUSTICE HARLAN is of opinion that no substantial error was committed, and the judgment should be affirmed.